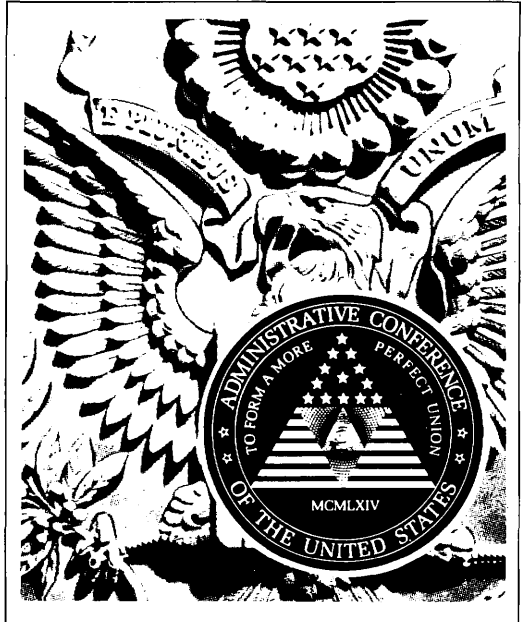


1989 ANNUAL REPORT



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Administrative Conference of the United States



LETTER OF TRANSMITTAL

Administrative Conference of the United States
Office of the Chairman
Washington, D.C.

March 1990

To the President and the Congress of the United States:

I have the honor to transmit herewith the 1989 Report of the Administrative Conference of the United States.

This report describes the significant activities of the Administrative Conference for the 12-month period from January 1, 1989 through December 31, 1989.

Respectfully,

Marshall J. Breger
Chairman

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CHAIRMAN'S FOREWORD

In his 1989 book *The Other Path*,¹ the Peruvian economist Hernando De Soto describes a study undertaken by that country's Institute for Liberty and Democracy to charter a small business in Lima. De Soto found that it would take an average citizen 289 workdays, require 11 permits, result in bribe requests from 10 officials, and cost some 32 times the monthly minimum living wage--all to meet the bureaucratic hurdles for a permit. Through this and related studies, De Soto and his colleagues came to perceive the crucial impact of administrative law and regulatory procedure on economic development. They recognized that such development can only occur where government rulemaking and adjudication are open to public access, arbitrariness is replaced by predictability, and private rights are protected by law. At that point, they came to the Administrative Conference to seek our guidance on how best to construct such a system. The Conference responded by helping to prepare a draft Peruvian Administrative Procedure Act, which currently is under consideration by the Peruvian government.

Under *perestroika*, Soviet reformers are attempting to overhaul the Soviet administrative apparatus from top to bottom, ensuring that government decisionmaking is more open, with decisions made promptly, reasons given and bureaucrats made accountable for their actions. Soviet and Eastern European officials also have come to look at what we do, and at least one prominent Soviet scholar has suggested the creation of a Soviet Administrative Conference to study and make recommendations for the improvement of administrative procedures. Those struggling to create a law-based society out of the ashes of Marxism-Leninism recognize that once the new constitutions are written, it is administrative procedure--that mundane, even prosaic branch of the law--that will largely determine on a day-to-day basis whether government agencies aid or hinder the goals of personal and economic freedom.

It is, of course, gratifying to see the esteem in which the Administrative Conference is held around the world and to note the extent to which we may serve as a model for some of the newly emerging democracies. In 21 short years, the Conference has become recognized as an engine for the constant improvement of the administrative system. Reflecting with our foreign colleagues on their attempts to create such a system from whole cloth, however, has also helped us in our effort to better fine tune procedures and structures in our own backyard: to ensure, in the words of the Administrative Conference Act, "that private

rights may be fully protected and regulatory activities and other federal responsibilities may be carried out expeditiously in the public interest.” In pursuit of this objective, the Administrative Conference examined a number of complex issues in the past year.

Courts and Agencies

As both judges and lawyers continually note, we face an imminent crisis in our civil justice system. The increased size of the judiciary cannot resolve the problem of rapidly increasing caseloads. More fundamental restructuring is necessary. A recurring issue is whether particular types of disputes will be adjudicated in administrative hearings or in courts. Can we, for example, reassign by legislative fiat environmental crimes or entitlement programs away from Article III courts to keep the caseload down? Is there any limit to the jail time and significant economic penalties one could suffer in non-Article III forums? Interestingly, language in one 1989 Supreme Court decision, *Granfinanciera S.A. et al. v. Nordberg*,² may significantly expand the range of non-Article III adjudications, be they by administrative law judges or Article I courts, and could conceivably pave the way for a greater shift of adjudicatory workload to the administrative judiciary.

It seems no virtue, however, to move cases from the federal courts to the administrative law system and to assume blithely that the problem of caseload has been solved. That solution only shifts litigation overload; it does not diminish it. We ought not forget that the administrative law system already has many times the caseload of the federal courts and that these cases can be vital to the individuals or corporations involved.

The Administrative Conference engaged in a number of projects during the past year that I believe will be useful in reducing the burgeoning caseload. Two particularly significant recommendations dealt with judicial review of agency statutory interpretations³ and agency indexing of adjudicatory decisions.⁴ In both cases, implementation of the Conference proposal would make the basis for agency decisions more deliberate and more consistent; in so doing, these recommendations should minimize the need for repeated and lengthy appeals, be they before an administrative tribunal or the courts.

A discussion of the proper venue for resolution of administrative disputes must also consider the number and changed role of administrative law judges (ALJs) since the Administrative Procedure Act (APA) was enacted in 1946. At first, the majority of ALJs were employed by the various economic regulatory agencies created by New Deal legislation⁵ and would typically write decisions pregnant with policy implications. Today, however, the bulk of the ALJ docket can be fairly categorized as important, yet routine, benefits cases (primarily disability appeals before the Social Security Administration and black lung cases at the Department of Labor) or enforcement cases (such as unfair labor practice cases

before the National Labor Relations Board and civil money penalty assessments imposed administratively by various agencies⁶). These cases turn primarily on factual disputes rather than policy determinations.⁷ Is a substantial increase in the number of ALJs a solution to the litigation crisis? I doubt it. First, the need for fiscal restraint has seemingly counseled against any major growth in the ALJ ranks. In the past decade, the total number of federal administrative law judges has actually declined: there were 1,005 ALJs at the beginning of 1990,⁸ compared with 1,071 in 1979.⁹ Perhaps more importantly, the increasing formality associated with ALJ hearing procedures subjects such procedures to the same tendency toward expense and delay that now affects the Article III judiciary.

Complementary Adjudicatory Processes

As a consequence of the above, agencies are gradually attempting to replace formal hearings in selected cases with less costly, less time-consuming alternatives. The trend began following the Supreme Court's decisions in the early 1970s finding that formal, APA hearing requirements need only apply if the agency's enabling statute expressly prescribed that agency hearings be "on the record."¹⁰

One noteworthy example of this trend is the increased use by a number of agencies of non-ALJ adjudicators, often called administrative judges. These adjudicators are not subject to APA selection guidelines or protections, although many operate under APA procedural requirements. While the number of ALJs in the federal government has stabilized, there were approximately 550 administrative judges by 1986,¹¹ and preliminary data suggest that that number has continued to climb. Immigration judges are perhaps one of the better known examples of administrative judges. The delegation of authority to a significant body of non-ALJ adjudicators has been seen as well at the Equal Employment Opportunity Commission, the Merit Systems Protection Board, and the Department of Veterans Affairs, to name a few. Many administrative judges are subject matter experts who serve the government on a part-time basis. This is largely uncharted terrain, and we at the Administrative Conference have begun a study of this complex world of administrative judges.

There are other instances of this expansion of processes outside the purview of the Administrative Procedure Act. On a few occasions, in the environmental area, Congress has gone so far as to expressly provide for the imposition of civil penalties without formal APA procedures.¹² Although no cases challenging this approach have yet reached the courts, the D.C. Circuit in 1989 upheld analogous EPA enforcement regulations against a due process challenge, where those regulations provided for the use of non-APA procedures (including the reliance on

EPA regional lawyers instead of administrative law judges as initial deciders) in cases involving interim corrective measures.¹³ This may be a fruitful area for future Conference study.

An area of major growth in this world of non-APA procedural innovation has been the field of alternative dispute resolution (ADR). Under the general rubric of ADR, agencies have developed a wide range of procedural techniques to complement conventional administrative or court litigation. Unfortunately, the federal government overall has continued to lag behind the private sector, where ADR techniques have become increasingly accepted at least for "money damages" civil litigation.¹⁴ And in government, administrative agencies are behind the judiciary in the use of ADR. Indeed, ADR experimentation has been institutionalized in selected federal district courts.¹⁵ The Conference, as those who follow our work know, has been in the forefront of efforts to expand the use of ADR wherever appropriate in the federal government and to develop innovative variations to accommodate particular agency needs. During the past year, the Conference undertook an exciting project to assist the Court of Appeals for the District of Columbia and the D.C. Circuit in their efforts to establish a wide-ranging dispute resolution program to resolve selected administrative appeals and other cases.

Agencies have also begun to use mediation techniques in which an ADR "neutral" (a disinterested person specially trained in dispute resolution) works with the parties to help secure a settlement. In addition to producing better results, this method will likely save the government a great deal of money in avoided litigation costs. One of our proud accomplishments for 1989 is the creation of the first roster of neutrals available to assist with federal disputes, greatly increasing agencies' access to mediation services nationwide.

I am pleased to state that the ADR concept is slowly gaining acceptance on a government-wide basis. The Conference worked closely with various congressional committees during the past year as support grew for legislation to encourage government use of alternative means of dispute resolution.¹⁶ We hope these bills will be enacted in the year ahead.

In addition to its government-wide efforts, the Conference continued to assist a number of individual agencies in ADR innovation. Our training programs in ADR continued to grow, and we look forward to aiding new agencies in the years ahead.

Questions of Process

In 1970, the Supreme Court in *Goldberg v. Kelly*¹⁷ created the notion of an "entitlement" to public welfare with the consequent requirement of "some kind of hearing" before that welfare benefit could be revoked. Since that time, courts have debated what kind of hearing is necessary--pre- or post-termination, and with what ingredients--but the

existence of a hearing requirement remains a lodestar in modern administrative law.

"Between the ideal and the reality," T.S. Eliot teaches, "falls the shadow." And in this instance, that shadow is the brute caseload pressure that affects development of the "some kind of hearing" principle. Caseload in the mass justice programs make it difficult for the due process intricacies demanded by appellate courts to be carried out in practice. Decisions are often hurried; reviewing officers spend little time assessing the record. As but one example, the Social Security Appeals Council, which reviews Social Security disability cases, can spend no more than 15 minutes per case.¹⁸

The proponents of perfect process will cry for more resources. And in a sense, they may be correct--after all, why shouldn't the problems of mass justice receive the same meticulous attention as a complex antitrust lawsuit. Nonetheless, in such matters it is all too easy for the best to be the enemy of the good.

Recent students of mass entitlement programs have urged the notion of "bureaucratic justice," arguing that caseload pressures make it necessary to reconceptualize the meaning of due process. Jerry Mashaw's study of the Social Security Administration disability adjudication process,¹⁹ for example, lays out the tremendous problem faced in mass justice adjudication. The paradigm of "bureaucratic rationality," he suggests, is a way to conceive of an administrative law system that focuses on consistency of decisionmaking and accurate and efficient implementation of agency policy. It represents a bureaucratic norm that promotes efforts to secure information sufficient to make accurate decisions while minimizing the system's error. This is a far less noble enterprise than rights advocacy in an adversary system context. Yet, in the end, it may produce fairer results for more persons enmeshed in the coils of the administrative state.

If you accept the bureaucratic justice model, then you would rely more on expert agency testers, determiners, weighers, and ponderers to make the best determination possible, and then and only then, allow the aggrieved person the right to challenge the *legal* bases for the determination (or perhaps allow limited factual review) before a legally trained adjudicator. Thus, one would have no quarrel with the employment of doctors at Social Security district offices, human rights specialists at asylum centers, or fraud-spotters at alien legalization centers so long as their determinations were subject to challenge in a tribunal (agency or court) for legal infirmities only. In three separate studies and recommendations adopted during 1989 the Administrative Conference urged movement in this direction.²⁰

These are but a very few of the complex topics the Conference dealt with during 1989. In perusing the pages that follow readers will see the dynamic manner in which the administrative process is subjected to renewal and development. As I have stated on previous occasions, the

success of the Administrative Conference is due in principle to two factors: on the one hand, a unique mix of active government officials, private practitioners, and scholars that comprise its membership and give it such a broad and balanced perspective; on the other, a devoted and highly professional career staff that keeps the Conference on the cutting edge of new developments.

Our colleagues in the currently emerging democracies are teaching us an old lesson anew: if modern government is to function efficiently and provide maximum protection day to day for the rights of citizens, administrative procedure must constantly develop and adapt, all the while remaining true to basics. The Conference has and will continue to demonstrate this essential balance.

1. H. De Soto, *The Other Path: The Invisible Revolution in the Third World* (Harper & Row, 1989).

2. *Granfinanciera S.A. et al. v. Nordberg*, 109 S. Ct. 2728 (1989).

3. ACUS Recommendation 89-5, Achieving Judicial Acceptance of Agency Statutory Interpretations, 1 CFR §305.89-5.

4. ACUS Recommendation 89-8, Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions, 1 CFR §305.89-8.

5. See Lubbers, *Federal Agency Adjudications: Trying to See the Forest and the Trees*, 31 FED. BAR NEWS & J. 383, 385 (1984).

6. The use of civil money penalties is another area in which the Conference is attempting to point the way. As early as 1972, the Conference issued a landmark recommendation on civil money penalties, urging agencies to consider the instances in which such penalties would be preferable to other forms of sanctions. In a follow-up study in 1979, the Conference undertook an empirical review of the civil penalties landscape and found that dozens of statutes had followed our model. See ACUS Recommendation 72-6, Civil Money Penalties as a Sanction, 1 CFR §305.72-6; Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 1979 ACUS 203; ACUS Recommendation 79-3, Agency Assessment and Mitigation of Civil Money Penalties, 1 CFR §305.79-3.

7. Year after year, the Conference's approach to this question has been incorporated into legislation in areas ranging from anti-fraud protection to banking reform, and has been endorsed by the judiciary in cases such as *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977) and its progeny. At the request of the Federal Aviation Administration (FAA) and with congressional encouragement, the Conference is currently examining the appropriateness of procedures in use in the FAA's demonstration program for imposition of civil money penalties and license revocation.

8. See Levant, *A Unified Corps of Administrative Law Judges- The Transition from a Concept to a Reality*, 6 W. NEW ENG. L. REV. 705, 709 (1984); Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266, 288-272 (1981).

9. The total number of ALJs on board by grade and agency as of January 28, 1990 (data available at the Administrative Conference of the United States).

10. Lubbers, *supra* n.5.

11. *United States v. Allegheny Ludlum Steel Corp.*, 406 U.S. 742 (1972); *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973).



Chairman Marshall J. Breger presiding at the 40th plenary session in December 1989.

12. Water Quality Act, 33 U.S.C. §1319 (g) (2) (West Supp. 1989) (civil penalties limited to \$25,000); Safe Drinking Water Act Amendments of 1986, 42 U.S.C. §300h-2 (West Supp. 1989).

13. *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989).

14. E.g., Wilkinson, *ADR is Increasingly Effective, Averts Litigation in Many Cases*, NATIONAL LAW JOURNAL, Vol. 10, no. 30, p. 1 (April 4, 1988).

15. The Judicial Improvements and Access to Justice Act (Pub. L. No. 100-702) (1988) explicitly authorized voluntary and mandatory arbitration in selected cases in Federal District Courts.

16. S.971, 101st Cong., 1st Sess. (1989) and H.R. 2497, 101st Cong., 1st Sess. (1989) ("The Alternative Dispute Resolution Act"). See also S.303, 101st Cong., 1st Sess. (1989) and H.R. 743, 101st Cong., 1st Sess. (1989) ("The Negotiated Rulemaking Act of 1989").

17. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

18. Koch and Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 1987 ACUS 625, 733; ACUS Recommendation 87-7, A New Role for the Social Security Appeals Council, 1 CFR §305.87-7.

19. J. Mashaw, *Bureaucratic Justice* (1983).

20. ACUS Recommendation 89-10, Improved Use of Medical Personnel in Social Security Disability Determinations, 1 CFR §305.89-10; ACUS Recommendation 89-4, Asylum Adjudication Procedures, 1 CFR §305.89-4; Statement on Mass Decisionmaking Programs: The Alien Legalization Experience, 1 CFR §310.14. It should be noted that in adopting these recommendations, the Conference did not commit itself to any particular model of adjudication.

INITIATIVES

Issues in administrative law and regulatory procedures are the purview of the Administrative Conference. As an independent agency, the Conference plays a vital role as an evaluator, researcher, advisor, and coordinator for programs and activities involving administrative law. As a scholarly institution within government, the Conference often conducts basic research at the request of other government agencies and departments.

Results of Conference work during 1989 were seen again in the areas of ethics, financial institutions, and alternative dispute resolution (ADR). New areas for which the Conference made several recommendations include administrative procedures in immigration, health care, and biotechnology regulation.

ALTERNATIVE MEANS OF DISPUTE RESOLUTION

In recent years the Conference has been in the forefront of efforts to explore agency use of alternative means of dispute resolution. ADR methods seek consensual solutions in which interested members of the public have participated and reached agreement. These methods include mediation, minitrials, arbitration, settlement judges, and early neutral evaluation. Far more than outcomes imposed by government bureaucrats, solutions reached using ADR may have the support and understanding of agencies and the affected parties.

The Conference's program in dispute resolution continued to conduct research into specific agency uses for ADR and focused on legislation, training, roundtables, and other specific activities to help agencies implement consensual methods of dispute resolution. Several pieces of legislation that would give the Administrative Conference additional resources to assist federal agencies seeking to use ADR were the subjects of congressional hearings and attracted considerable interest in both houses of Congress. Conference staff provided support to drafters of S. 971, the Administrative Dispute Resolution Act, which would expressly implement numerous recommendations made by the Conference. At the opening session of the annual conference of the Society of Professionals in Dispute Resolution, Congressman Dan Glickman (D.-Kan.) gave credit to the Administrative Conference for its role in supporting the Glickman-Grassley ADR legislation.

In 1989 the Conference created a roster of mediators and neutral advisors to assist in resolving federal disputes. The roster is a computerized database containing names of dispute resolution specialists, increasing agencies' nationwide access to mediation services.

A series of Conference studies and recommendations on acquiring and using neutrals spawned development of the roster as did requests from the Environmental Protection Agency (EPA) and other agencies. EPA provided generous support and advice in developing the roster.

Several new initiatives were undertaken in 1989. These included a series of roundtable discussions targeted to reach agency policymakers, general counsels, and administrative law judges (ALJs), and a unique, coordinated program to assist the Court of Appeals for the DC Circuit and the District Court in their efforts to establish a broad variety of mediation and other consensual methods to resolve selected administrative appeals and other cases.

A private grant from the Eugene and Agnes Meyer Foundation allowed for training mediators and will allow for roundtables. An award from the Culpeper Foundation will allow the Conference to further its work with agencies and help to establish a dispute resolution program for the U.S. Courts for the DC Circuit. The grant will also enable the Conference to evaluate the Courts' program, to publish a "how to" guide for other circuits and for federal agencies that use ALJs, and to develop and conduct an extensive series of roundtables on court and agency uses for ADR in federal litigation.

In late 1988, the Conference--at the request of the General Counsel of the Department of Commerce--initiated a project designed to assist in organizing the implementation of the path-breaking dispute settlement provisions of the U.S.-Canada Free Trade Agreement (FTA). This agreement encourages mediation and nonbinding (and even binding) arbitration of a wide array of issues, and offers new opportunities for an effective, innovative system for avoiding and resolving international trade disagreements.

Jointly with its FTA advisory committee, the Conference sponsored a seminar in February to discuss implementing the new processes under the FTA. The seminar, which attracted 300 people, preceded the close of the public comment period on two sets of rules that implement the FTA: the Department of Commerce's Chapter 19 interim rules and the International Trade Commission's proposed rules on antidumping and countervailing duty panel proceedings. Panelists included government representatives, members of the bar and academe, and other international trade and ADR experts. Proceedings from the seminar were published in the *STANFORD JOURNAL OF INTERNATIONAL LAW*.

In June the Administrative Conference completed a project intended to reduce litigation in contract disputes by strengthening the role of federal agency contracting officers (COs) in resolving these disputes at early stages through more consensual means. A report by consultant Richard Bednar showed how training COs in negotiation skills and ADR

techniques could contribute substantially to resolving contract disputes prior to their reaching the more lengthy and expensive procedures before agency boards of contract appeals or in the U.S. Claims Court.

The project, which built on two earlier studies produced for the Conference and the American Bar Association, led to adoption of Recommendation 89-2, "Contracting Officers' Management of Disputes." The Conference followed up to implement the recommendation by initiating efforts to work with the National Contract Management Association to carry out the recommended training for agency COs and private contracting personnel.

Under the direction of Distinguished Visiting Fellow Wallace Warfield, the Conference continued its training initiatives, including multi-day negotiation and dispute resolution courses with personnel from the U.S. Forest Service, Occupational Safety & Health Review Commission, and Armed Services Board of Contract Appeals, as well as a separate 3-day course for more than 30 ALJs co-sponsored with the National Judicial College.

Conference work in ADR is helping agencies improve their dispute handling procedures. With continued focus on alternatives to traditional adjudicatory procedure, the Conference eventually hopes to see all agencies consider ADR routinely when administering their programs. This emphasis will make agency actions more acceptable and equitable to those regulated by the government and to the public.

GOVERNMENT ETHICS

The Special Conference Committee on Ethics in Government, established in late 1987, continued to study the need for improvements in the federal government's system for regulating conflicts of interest. In June 1989 the Conference adopted two formal recommendations on this subject.

One of these recommendations advised Congress to establish special conflict-of-interest disclosure rules for members of federal advisory committees. Under the Conference's scheme, all committee members would be required to disclose a limited amount of information about their financial interests, regardless of their classification as special government employees or as representatives of particular interests. In addition, agencies would be obliged to communicate clearly to advisory committee members the conflict-of-interest restrictions that applied to them.

The second recommendation called upon Congress to amend the Ethics in Government Act's executive branch public financial disclosure requirements to achieve a better balance of the costs and benefits of such disclosure. It included recommendations for lowering the threshold for reporting liabilities and for eliminating unnecessary detail in reporting assets, liabilities, and gifts. The recommendation was submitted to the Counsel to the President and to the President's Commission on Federal Ethics Law Reform.

The Conference's initiative on regulation of government conflicts of interest bore fruit when the Ethics Reform Act of 1989 (Pub. L. 101-194) was signed by President Bush on November 30, 1989. The new Act implemented Conference Recommendation 88-4 that urged Congress to amend the Internal Revenue Code to permit deferred taxation of gains realized when appointees to government positions were required to divest property to satisfy conflict-of-interest requirements. The recommendation had been endorsed by both the President's Commission on Federal Ethics Law Reform and the National Commission on the Public Service (the Volcker Commission), and President Bush included the proposal in his proposed ethics legislation. Section 502 of the Ethics Reform Act of 1989 establishes procedures for deferral of taxes when the President or the Office of Government Ethics determines that the sale of property is necessary to comply with federal ethics laws.

The Ethics Reform Act (section 405) also dealt with the issue of advisory committee members' conflicts of interest by establishing a new waiver provision in 18 U.S.C. §208, coupled with public disclosure of relevant financial information when such waivers are granted. Thus, while not the precise procedural remedy recommended by the Conference, the new procedure will nonetheless alleviate problems agencies and advisory committee members wrestled with under prior law.

At the end of 1989, the Conference was studying two other aspects of government ethics. One study will examine the role of government and private attorneys in representing federal employees charged with wrongdoing; the other will explore impediments to pro bono representation of private clients by government attorneys.

BANKING REGULATION

The Conference played a significant role in the development of a number of administrative procedural provisions of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA, Pub. L. 101-73, 103 Stat. 183). The Special Committee on Financial Services corresponded with the Banking Committee chairpersons in the House and Senate, expressing its views on procedural provisions in the draft legislation. In addition, Conference Recommendation 88-8, "Resolution

of Claims Against Savings Receiverships," was brought to the attention of House and Senate members and staff and was a factor in the formulation of the claims determination provisions adopted in FIRREA. Those provisions called for the creation of alternative dispute resolution processes on which the Conference provided advice. Lawrence G. Baxter, of Duke University School of Law, a consultant to the Conference wrote the report on which Recommendation 88-8 was based and prepared, at the request of congressional staff, a detailed analytical memorandum comparing and contrasting the administrative procedural provisions of the House and Senate bills leading to the enactment of FIRREA. Professor Baxter and Conference staff also met or conversed on numerous occasions with key congressional staff members concerning proposed provisions in FIRREA.

Conference Recommendation, 87-12, "Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies," also was influential in the drafting of FIRREA. Recommendation 87-12 urged the federal bank regulatory agencies to develop a set of uniform rules and procedures for administrative adjudications, as well as the creation of a pool of administrative law judges common to the banking agencies. FIRREA adopted these provisions.

AGENCY ACTIONS

Two recommendations the Conference adopted in 1989 deal with actions agencies should take: one with respect to review of agencies' statutory interpretations; the other with respect to development of an index of agencies' adjudicatory decisions. Recommendation 89-5, "Achieving Judicial Acceptance of Statutory Interpretations," deals with judicial acceptance of agency statutory interpretations expressed in various formats. The Supreme Court's opinion in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), set forth the standards for courts to apply in reviewing an agency's interpretation of a statute it administers. First, the court is to determine whether Congress has directly spoken to the precise question at issue. If so, then Congress' intent will bind both the court and the agency. Where Congress' intent is not clear, however, the court must accept the agency's interpretation if it is based on a reasonable construction of the statute.

In a study prepared for the Conference, Robert Anthony, Professor of Law at George Mason University, reviewed post-*Chevron* case law involving judicial review of agency statutory interpretations and identified

a relevant factor that may sometimes be overlooked--the format or context in which the agency expresses its statutory interpretation. While relatively formal proceedings such as rulemakings or adjudicatory opinions often provide the setting for statutory interpretations, agencies may also have occasion to interpret statutory provisions in a wide range of other formats, including court briefs, interpretive rules, staff instructions, press releases, and speeches, among others. Interpretations made in the more formal settings are generally the product of reasoned deliberation by the agency, often seasoned by the views of those outside the agency who may be affected by the interpretation, while interpretations expressed in other, more casual formats may be no more than a tentative, "trial-balloon" approach to a statutory provision.

Professor Anthony concluded that congressional intent should be considered with respect to the format in which a statutory interpretation is expressed as well as with respect to the substance of the interpretation, and that judicial acceptance of agency interpretations under *Chevron* is appropriately extended only when Congress has delegated authority to the agency to express definitive statutory interpretations in the format the agency has used. This will most often, though not always, be a relatively formal format such as a rulemaking or formal adjudication. Since the Supreme Court announced the *Chevron* standard, however, agencies have sometimes successfully asserted that informally expressed statutory interpretations should be accepted as definitive by the courts, without consideration of whether the agency possesses the authority to make binding interpretations in the format it has used. Recommendation 89-5 urges agencies intending to issue definitive statutory interpretations to use procedures congressionally authorized for that purpose.

Recommendation 89-8, "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," urges that agencies that do not already do so should compile a subject-matter index of their adjudicatory decisions. This index could provide information useful in dealing with the agencies and help in developing agency standards and policies on general issues and recurring questions. Indexes should be either universal, including all final decisions, or selective, including all significant decisions, whether or not they are considered precedential. The agency index, which should be fully disclosed and readily available, should cover the adjudicatory decisions of the agency's highest level tribunal. The agency should also consider whether to index significant lower level decisions that have become final.

A copy of the final recommendation was sent to the Social Security Administration. Other initiatives to implement Recommendation 89-8 will follow in 1990.



Professor Emeritus Kenneth Culp Davis, Joan Anthony, and Robert Anthony, law professor at George Mason University, discussing judicial review of agency statutory interpretations.

MEDICAL BENEFIT PROGRAMS

The Conference took action on several projects involving procedures relating to medical benefit programs. Recommendation 89-1, held over from the previous year, dealt with peer review organizations (PROs) in the Medicare program. Recommendation 89-10 addressed the use of medical decisionmakers in the Social Security disability program. In addition, the Conference prepared a report for the Social Security Administration on the disability benefit appeals process.

Recommendation 89-1, "Peer Review and Sanctions in the Medicare Program," arose from a study of the peer review organization system in the Medicare program conducted by Professor Timothy Jost of Ohio State University. The study focused on how relevant policies and decisions made by PROs and the Department of Health and Human Services were made and communicated to the public. It also dealt in some detail with the peer review sanction process for Medicare providers who render improper medical care. Among the recommendations adopted by the Conference were proposed changes in the procedures for imposing sanctions and suggestions for ways to improve communicating PRO decisions and Department of Health and Human Services policies to Medicare beneficiaries and the public.

The Conference also approved Recommendation 89-10, "Improved Use of Medical Personnel in Social Security Disability Determinations." The recommendation was based on a report to the Conference by Professor Frank Bloch of Vanderbilt University Law School that examined five federal agencies' uses of medical personnel. Recommendation 89-10 called on the Social Security Administration to enhance the role of medically-trained personnel in the initial decision of eligibility and to improve the quality of medical evidence used in disability decisionmaking. The Conference recommended several steps that would give medical personnel primary responsibility for evaluating and resolving certain specified medical issues relevant to a claim, increase their responsibility for compiling all relevant medical data, and otherwise make more effective use of these personnel in a decisionmaking role. The Conference expressed the view that these changes should improve the quality of initial decisions and result in long-term savings as a result of elimination of the reconsideration stage, greater attention to effective early development of medical evidence, and reduced numbers of administrative and federal court appeals.

The Social Security Administration, as part of a review of its appeals procedures in the Social Security disability program, asked the Conference to prepare a report summarizing appeals procedures in other disability programs, synthesizing relevant previous Conference recommendations, analyzing the relevant statutes, and making some recommendations for change. This report was submitted to the Social Security Administration in June, and may be considered as a basis for additional formal Conference recommendations in 1990.

IMMIGRATION ISSUES

At the suggestion of its appropriations subcommittee in the House of Representatives, the Conference, starting in 1988, undertook several projects relating to immigration procedures. The Conference initially asked Professor Stephen Legomsky of Washington University Law School to prepare an agenda of topics that warranted study. Following up on his suggestions, the Conference began studies on three topics: (1) the alien legalization program; (2) the process for granting asylum; and (3) the reviewability of consular visa denials.

In 1989, the Conference considered the second phase of the legalization project, which focused on the alien legalization program under the Immigration Reform and Control Act, and analyzed it as a potential model for mass decisionmaking programs. At the June plenary session, the Conference adopted a Statement, "Mass Decisionmaking Programs: The Alien Legalization Experience," which suggested that

agencies administering mass programs consider the Immigration and Naturalization Service's (INS) structure of a few remote decisionmaking centers, and emphasized the need for frequent consultation to ensure consistency and exchange and access to information by both the agency and the public. The statement also made some specific suggestions to the INS concerning the remaining phases of the alien legalization process. Those suggestions included improving the case tracking system, ensuring better communication with program applicants, and taking additional steps to deal with potential fraud.

Recommendation 89-4, "Reforming Asylum Adjudication," endorses a reorganization of the administrative process for adjudicating asylum applications to satisfy the dual aims of preserving the humanitarian tradition of granting refuge to the persecuted and of effectively responding to the dramatic increase in the number of applications for asylum. The recommendation endorses the creation of a new Asylum Board, located within the Executive Office of Immigration Review in the Department of Justice, consisting of an adjudication division, an appellate division, and a documentation center.

The adjudication division, as endorsed by the recommendation, would be staffed by attorneys, handling only asylum cases, who are familiar with international relations and refugee affairs and who are sensitive to the difficulties of cross-cultural communication. They would be expected to develop an expertise in country conditions, with the assistance of the documentation center, which would allow them to fulfill their primary responsibility of posing illuminating questions and developing the record. Applicants, or their counsel, would have a reasonable and adequate opportunity for additional questioning and entry of relevant information, including presentation of witnesses. The Immigration and Naturalization Service would not be represented as an adverse party. The recommendation urges applying resources to enhance the professionalism, independence, and expertise of the adjudicators and to ensure fair and expeditious adjudications, so that genuine refugees may be speedily given a secure status and unqualified applicants, absent circumstances that would allow them to remain in this country, may be promptly deported.

The appellate division would consider appeals by persons denied asylum at the initial stage and would have the authority to require certification to it of selected cases to foster consistency, fairness, and political neutrality.

The recommendation urges that the documentation center maintain current information on country conditions gathered from governmental and nongovernmental sources, and be open to applicants for asylum and their counsel. The documentation center would also respond to requests for more specific information received from officials of the Asylum Board.

The recommendation also encourages the Department of Justice to take advantage of the resources, assistance, and information available through the Department of State and the United Nations High Commissioner for Refugees. There is provision for the State Department to view those individual cases that may be sensitive.

The recommendation does not take a position on the suitability of detention in asylum proceedings, but does suggest that where detention is used it should be clear that it is not punitive. Finally, the recommendation urges that appropriate arrangements should be made to combine, for purposes of judicial review, the record of proceedings before the Asylum Board with that of the regular deportation or exclusion proceedings before the immigration judges and the Board of Immigration Appeals.

Shortly after the adoption of Recommendation 89-4, a letter was sent to Attorney General Thornburgh explaining the recommendation and urging him to consider it when he decided what rules to draft when shaping the asylum process.

The Conference also studied the processing and review of visa denials by consular officials. This process has historically been free from independent review; consular officers have almost total discretion in



Abraham Sofaer, legal adviser to the State Department, raising concerns about proposed changes to visa review procedures.

determining whether to grant or deny a visa. While the study found that the quality of consular decisionmaking is generally quite high, the lack of review has created problems of fairness and consistency. Recommendation 89-9, adopted at the December plenary session, makes a number of suggestions to the Department of State concerning changes it could make at the consular level to improve the reliability and fairness of visa processing. Among them are permitting the assistance of attorneys, improving written explanations for visa denials, and developing a uniform process for review of denials within the consulates themselves. The recommendation also asks the State Department to develop and submit to Congress a proposed process for centralized administrative review of consular visa actions.

These projects are part of the Conference's continuing interest in immigration procedures. Over the years, it has studied several other aspects of immigration administration, including change of status proceedings, administrative review in immigration proceedings in general, and the potential extension of the alien legalization program.

BIOTECHNOLOGY REGULATION

While new techniques of altering the genetic structure of organisms promise great benefits in medicine, agriculture, and manufacturing, they also raise concerns about safety and environmental protection. Starting with a study by Professor Sidney A. Shapiro of the University of Kansas School of Law, the Conference examined the experience of federal agencies in attempting to regulate the rapidly developing field of biotechnology.

Under current law, genetically-engineered organisms are regulated under a variety of statutes intended to protect the public. Several federal agencies share these statutory responsibilities. The Conference, in Recommendation 89-7, "Federal Regulation of Biotechnology," emphasized the importance of continued interagency coordination of regulatory activities. The Conference believes that the Office of Science and Technology Policy's Biotechnology Science Coordinating Committee (BSCC) should have primary responsibility for identifying issues, exchanging information, and preparing reports on issues common to several agencies. However, responsibility for establishing uniform policies should be retained by the Office of Management and Budget working in coordination with BSCC.

The Conference does not suggest new legislation in this area, but urges the President to make coordination of the government's activities relating to biotechnology a high priority. Specific steps recommended include monitoring the effectiveness of interagency coordination and enlarging the membership of the BSCC, as appropriate. The recommendation urges the President's Science Adviser to establish a policy for the BSCC that will foster opening its proceedings to the public. The Conference also suggested ways that individual regulatory agencies can improve public participation in agency decisionmaking and can meet the public's need for biosafety information without divulging confidential business information.



Conference consultant Sidney Shapiro answering question on biotechnology regulation at the December plenary.

RESEARCH ACTIVITIES

The Conference conducts most of its research by using the services of outside academic or professional consultants, typically law professors with a strong interest in administrative law issues. After a consultant completes a commissioned study, the appropriate Conference committee reviews the report and often develops a proposed recommendation on the subject to be considered by the Assembly of the Conference.

At the end of 1989, approximately 30 research projects were underway. The principal areas of research in 1989 were alternative dispute resolution, bank regulatory procedures, government ethics laws, international trade procedures, and the federal health care system. Following is a list of some of these projects:

ADMINISTRATIVE PROBLEMS OF BANK FAILURES: Professors Jonathan R. Macey (Cornell University) and Geoffrey P. Miller (University of Chicago) have undertaken a study of procedural and regulatory problems raised by failing or almost-failing banks. The Special Committee on Financial Services has developed a proposed recommendation based on their report, which the Conference will consider in 1990.

AUDIT AND INSPECTION PRACTICES OF THE BANKING AGENCIES: This study examines the process of bank examiners' informal determinations during audits and examinations and disclosure of audit results. Professor Roy Schotland (Georgetown University) will submit a report on this subject in 1990.

CHOICE OF FORUM IN GOVERNMENT CONTRACT LITIGATION: Under current law challengers to government action in contract cases have a multiplicity of forums. In pre-award (bid protest) cases challenges may be filed in a half dozen forums, including district courts, the General Accounting Office, or the General Services Administration Board of Contract Appeals for computer-related contracts. In post-award disputes the choice is between the U.S. Claims Court or the appropriate agency board of contract appeals. Professor Robert N. Davis of Washington and Lee University will evaluate the impact of this choice of forum.

CONGRESSIONAL ACCESS TO CONFIDENTIAL AGENCY INFORMATION: Professor Peter M. Shane of the University of Iowa is examining the history of recent disputes over congressional access to internal agency memoranda and commissioners' notes and proposing better ways of resolving those disputes.

DESIGNATION OF "REPRESENTATIVE PAYEES" FOR SOCIAL SECURITY BENEFICIARIES: Under current law the Social Security Administration (SSA) must designate and monitor the activities of persons who receive social security payments on behalf of beneficiaries deemed to be incapable of managing their own financial affairs. This study, requested by SSA and undertaken by Professor Margaret Farrell (Yeshiva University), is analyzing SSA's obligations under current constitutional and administrative law and state guardianship, custody, and competency law.

ELECTRONIC TECHNOLOGIES AND FEDERAL ARCHIVAL PRACTICES: This project is a sequel to a 1988 Conference study that was principally concerned with agency acquisition and release of computerized information. Professor Henry H. Perritt, Jr. of Villanova University, the consultant for the earlier study, is now examining how electronic records are, and should be, covered by records preservation statutes.

EVALUATION OF THE NATIONAL CHILD VACCINE INJURY COMPENSATION PROGRAM: In 1986 Congress passed a law to ensure prompt and reasonable compensation to those children who suffer adverse reactions to vaccines, an inevitable result of otherwise highly beneficial immunizations. This no-fault compensation program requires a petition to, and adjudication by, the U.S. Claims Court. Petitioners may elect to accept the judgment or pursue a tort action in state or federal court. Professor Wendy K. Mariner of Boston University's School of Public Health and Medicine is evaluating the program. A report is due in 1990.

THE EXPORT ADMINISTRATION ACT: LICENSING PROCEDURES AND JUDICIAL REVIEW: Professor Howard N. Fenton (Ohio Northern University) is examining issues concerning the regularity and openness of the export licensing process as well as the appropriateness of the current limitations on judicial review.

FEDERAL AVIATION ADMINISTRATION'S (FAA) SANCTION AND ENFORCEMENT PROCEDURES: The FAA has authority to revoke pilot licenses as well as impose civil money penalties. The FAA is now imposing penalties of less than \$50,000 under a 2-year, congressionally-authorized demonstration program. At the FAA's request, the Conference is evaluating the appropriateness of the procedures established for the demonstration program to assist the agency and the Congress, which extended the demonstration program by 4 months to await the Conference's study. Professor Richard H. Fallon, Jr. of Harvard University will submit a report early in 1990.

FOOD AND DRUG ADMINISTRATION'S (FDA) DRUG APPROVAL PROCESS FOR AIDS DRUGS: Pressures to more rapidly approve drugs to combat AIDS has spurred the FDA to reexamine its approval process for such drugs. This study, undertaken by James T. O'Reilly (University of Cincinnati), is looking at the current drug approval process in detail, including any accommodations made for AIDS drugs, and evaluating the tradeoffs involved.

FEDERAL BANK REGULATORY ENFORCEMENT PROCEDURES: Professor Lawrence G. Baxter of Duke University is evaluating the enforcement procedures contained in the Financial Institutions Reform, Recovery and Enforcement Act of 1989. A report of his conclusions is due in 1990.

IMPLEMENTATION OF THE FARMERS HOME ADMINISTRATION MEDIATION (FMHA) PROGRAM: The Farm Credit Act of 1988 mandates that the FMHA establish a mediation program to resolve farmer-lender disputes. Professor Leonard L. Riskin (University of Missouri-Columbia) is studying this program to determine if improvements are needed and whether such mediation programs might be useful elsewhere in the government.

INSPECTORS GENERAL: The Conference, with the support of the Governance Institute, has begun a study of the role of Offices of Inspector General in carrying out responsibilities of internal oversight of agency programs and in preventing waste, fraud, and abuse. The study being conducted by Dean Paul Light of the University of Minnesota's Hubert H. Humphrey Institute is focusing on Inspector Generals' independence, accountability, investigative authority, and their relationships with Congress, the President, and agency program managers.

JUDICIAL REMANDS OF CASES TO ADMINISTRATIVE AGENCIES: Professors E. Donald Elliott (now General Counsel, Environmental Protection Agency) and Peter Schuck, both from Yale University, have submitted a study of the outcome of appeals from agency decisions that are subsequently remanded to the agency by the reviewing court. The Committee on Judicial Review is expected to consider this matter in 1990.

THE MEDICAID PROGRAM: ASPECTS OF PROCEDURE AND FEDERALISM: Professor Eleanor Kinney (Indiana University) is conducting an analysis of the Medicaid program, focusing on its procedural and federalism aspects.

NATIONAL LABOR RELATIONS BOARD'S (NLRB) USE OF INFORMAL RULEMAKING TO ESTABLISH BARGAINING UNITS: For many years commentators urged the NLRB to use rulemaking rather than adjudication to make policy concerning bargaining units or unfair labor practices. In April 1989

the Board issued a final rule concerning bargaining units in the health care industry. Professor Mark H. Grunewald (Washington and Lee University) is studying this first NLRB rulemaking to see what lessons can be drawn from it.

THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION'S (OSHRC's) "SIMPLIFIED PROCEEDINGS" AND CASE SETTLEMENT PROCEDURES: OSHRC's rules of practice provide for use of both "simplified proceedings" and settlement judges in appropriate cases. Professor Morrell E. Mullins (University of Arkansas-Little Rock) is assessing the operation of these procedures.

OVERSIGHT AND REGULATION OF GOVERNMENT-SPONSORED ENTERPRISES: Thomas H. Stanton, Esq. has been commissioned to study the structure and procedures followed by government-sponsored enterprises. While such entities can expose the U.S. Treasury to heavy liability, they appear to be regulated in a relatively fragmented and sporadic manner. The study is expected to lead to suggested improvements in this regard.

POTENTIAL USES FOR OMBUDSMEN IN FEDERAL PROGRAMS: The study focuses on present and past attempts to create ombudsmen in federal programs. The Conference's consultants, David R. Anderson, Esq. and Diane M. Stockton are examining the recent establishment of ombudsmen in the Internal Revenue Service (to help resolve taxpayer grievances) and the Environmental Protection Agency (to resolve Superfund disputes) as well as proposals for a beneficiary ombudsman in the Social Security Administration.

PRO BONO PRACTICE BY GOVERNMENT ATTORNEYS: Government attorneys may, in some circumstances, engage in outside employment, but they generally are precluded from representing clients before agencies of the federal government. This restriction has limited government attorneys' ability to take *pro bono* cases to fulfill their professional service obligation. Professor Lisa Lerman (The Catholic University) is exploring whether modifications in current practice are appropriate or feasible.

PROCEDURES FOR DECIDING ANTIDUMPING AND COUNTERVAILING DUTY CASES: Professors John H. Jackson (University of Michigan) and William J. Davey (Fordham University) have undertaken a procedural review of antidumping and countervailing duty cases that will focus on proceedings at both Department of Commerce and the U.S. International Trade Commission. A report is expected late in 1990.

RISK COMMUNICATION AS A REGULATORY APPROACH: This study assesses "right-to-know" statutes and regulations administered by the Environmental Protection Agency, Occupational Safety and Health Administration, and FDA. Professor Michael Baram of Boston University will submit a report in early 1990.

U.S. AGENCY PARTICIPATION IN INTERNATIONAL STANDARD SETTING: In this case study, Professor George Bermann of Columbia University is examining the Federal Aviation Administration's participation in the European Community's efforts to set standards for civil aircraft airworthiness.



James A.R. Nafziger, consultant on visa denial procedures, presenting his research at the December plenary.

INFORMATION INTERCHANGE AND CLEARINGHOUSE

The Conference serves as a valuable resource to Congress, federal agencies, and the public. Staff assist Senators and Representatives in drafting legislation pertaining to issues covered by Conference recommendations. Conference members and staff are also available to assist federal agencies seeking to revise or implement their administrative procedures.

As a clearinghouse for information on administrative law, the Conference maintains a library that contains a substantial collection of legal periodicals and reference guides on administrative law and procedure and is open to anyone, federal personnel and private citizens alike. In addition, the Conference publishes sourcebooks, which collect the most relevant administrative law statutes, as handy desk references for use by those whose work requires ready access to such material.

The Conference is also committed to providing economical and effective education and training in current administrative issues. Consequently, it sponsors regular seminars and colloquies on topics covered by its recommendations as well as emerging issues in the national debate.

LEGISLATIVE ASSISTANCE

In 1989 the Conference continued its efforts to review systematically new legislation and provide Congress with advice and assistance on a wide range of legislative matters pertaining to administrative procedure. These efforts led Congress to rely on Conference initiatives in connection with four laws enacted in 1989.

Public Law 101-73, the Financial Institutions Reform Recovery and Enforcement Act of 1989, legislation to restructure the oversight of the thrift industry, included a requirement that the bank regulatory agencies establish their own pool of administrative law judges and develop a set of uniform rules of procedure for administrative hearings before those agencies. The new law implements, in part, Recommendation 87-12. Public Law 101-194, the federal ethics-pay legislation, incorporated Conference Recommendation 88-4 concerning deferred

taxation for divestitures required to avoid conflicts of interest. Public Law 101-236 extended for 4 months the Federal Aviation Administration's civil penalty demonstration project. The extension was granted expressly to permit the Conference to complete its study of the civil penalty program and submit a report to Congress. Public Law 101-235, the Department of Housing and Urban Development Reform Act of 1989, included provisions authorizing the administrative imposition of civil money penalties against certain mortgagees and lenders, multifamily mortgagors, violators of the Interstate Land Sales Full Disclosure Act, and issuers and custodians of mortgages guaranteed by the Government National Mortgage Association. These provisions provide for the imposition of civil money penalties and judicial review in accordance with the procedures proposed in Recommendation 72-6.

Conference proposals were also incorporated into a number of bills introduced during 1989. S. 303 and H.R. 743, the Negotiated Rulemaking Act of 1989, reflected Conference initiatives to provide a legislative underpinning for the conduct of negotiated rulemaking by federal agencies. The bills incorporate the basic provisions of Conference Recommendations 82-4 and 85-5 and provide for various kinds of assistance to agencies by the Conference. S. 303 passed the Senate in 1989 but was not acted on in the House. S. 971 and H.R. 2497, bills introduced by Senator Grassley (R.-Iowa) and Congressman Glickman (D.-Kan.), respectively, to provide a statutory footing for agency use of alternative means of dispute resolution, likewise incorporate numerous Conference recommendations. H.R. 7, a bill to amend the Carl D. Perkins Vocational Education Act, which passed the House in 1989, directed the Secretary of Education to use regulatory negotiation techniques in accordance with Conference guidelines when proposing regulations under the legislation. The bill specifically refers to Conference recommendations.

Both Senator Metzenbaum (D.-Ohio), the sponsor of S. 436, the Employee Health and Safety Whistleblower Protection Act, a bipartisan bill to protect whistleblowers in the private sector, and Senator Grassley, the lead co-sponsor, commented favorably on the Conference's detailed study of the issue and Recommendation 87-2 when introducing the bill. Both S. 436 and the whistleblower bill introduced in the House by Congressman Ford (D.-Mich.) (H.R. 3368), incorporated much of Recommendation 87-2.

The Chairman of the Administrative Conference would be one of three members of a selection panel under a bill introduced by Senator Pryor (D.-Ark.) (S. 1570) to establish an independent office of Chief Administrative Law Judge within the Social Security Administration. The Secretary of Health and Human Services would select a Chief Administrative Law Judge from among three nominees submitted by the selection panel.

The Conference presented testimony before six separate House or Senate subcommittees during 1989. Among other things, the Confer-

ence offered views to the House Subcommittee on Labor-Management Relations on legislation for the uniform handling and resolution of private sector whistleblower complaints (H.R. 3368); to the House Subcommittee on Administrative Law and Governmental Relations and the Senate Governmental Affairs Committee, respectively, on bills to enhance the use of negotiated rulemaking (H.R. 743) and alternative methods of dispute resolution (S. 971); and to the Subcommittee on Human Resources of the House Post Office and Civil Service Committee on the effects of government ethics restrictions on the recruitment and retention of federal employees. Richard Berg, the Conference's consultant on the application of conflict of interest laws to federal advisory committees, offered his views to the Senate Governmental Affairs Committee at hearings on a bill to amend the Federal Advisory Committee Act (S. 444). The Office of the Chairman provided written comments on S. 444.

The Conference regularly reviews new legislative proposals to alert Congress to potential issues of process and procedure. The Conference staff provided assistance on procedural issues embedded in the thrift industry legislation. Recommendation 87-3, "Agency Hiring of Private Attorneys," was brought to the attention of the Senate Judiciary Committee following the introduction of S. 90, the Legal Fees Equity Act of 1989. Recommendation 88-9, "Presidential Review of Agency Rulemaking," was transmitted to the Senate Governmental Affairs Subcommittee on Government Information and Regulation, in connection with its evaluation of bills to amend and reauthorize the Paperwork Reduction Act. The House Governmental Operations Subcommittee on Information, Justice and Agriculture was urged to consider Recommendation 88-10, "Federal Agency Use of Computers in Acquiring and Releasing Information," in connection with consideration of electronic information and the Freedom of Information Act. Conference staff also presented Recommendation 89-1, "Peer Review and Sanctions in the Medicare Program," to the Senate Finance Committee and the House Ways and Means Committee, which were developing legislation on this subject.

ADVICE AND ASSISTANCE TO AGENCIES

The Conference presented the third edition of its annual seminar designed to acquaint congressional staff with the intricacies of administrative law. The program included presentations dealing with the practical aspects of agency implementation of statutory directives, the use of rulemaking, and judicial review of agency action.

During 1989, the Conference's program of advice and assistance to federal agencies continued to focus on the establishment of alternative dispute resolution (ADR) procedures.

Conference staff organized or participated in a variety of training activities during the year. Training was organized for Forest Service contracting officers and other procurement officials and for Occupational Safety and Health Review Commission administrative law judges (ALJs). A program for federal ALJs and administrative judges was co-sponsored with the National Judicial College. Conference staff also participated in ADR training as part of a series of Office of Personnel Management programs in Denver as well as a program for agency members of boards of contract appeals.

Other ADR activities included a major roundtable for agency officials on use of negotiated rulemaking and continuation of an ADR working group for agency personnel interested in dispute resolution. Specific consultations were held with the staff of the Interior Department's Bureau of Land Management to aid in their first use of negotiated rulemaking (reg-neg). The Conference also helped the Federal Aviation Administration and Federal Communications Commission to set up a mediation over differences regarding the siting of broadcast facilities in the vicinity of airports.

Rules for the Conference's Roster of Neutrals, developed to aid agencies who wish to find a suitable person to aid in dispute resolution, were published in the Federal Register with the Office of Management and Budget's approval, and applications are being received. At least one agency, the Department of Education, has already referenced the Conference's roster in its procedural rules.

In other areas, the Conference filed formal comments to the Department of Health and Human Service's Health Care Financing Administration on its proposed rule relating to the criteria and procedure for making medical services coverage decisions that relate to health care technology in the Medicare program. The Conference commended the proposal, but suggested some changes based on Recommendations 86-5 ("Medical Appeals") and 87-8 ("National Coverage Determinations Under the Medicare Program").

The Conference also submitted materials to the new Resolution Trust Corporation (RTC) from its ongoing study of how federal bank regulatory agencies administer failed and failing institutions. The RTC had requested comments on its strategic plan. Another bank regulatory agency, the Comptroller of the Currency, acknowledged Conference Recommendation 87-12 when it announced its intention to begin publishing its enforcement decisions.

The Conference assisted two congressional support agencies in 1989. It submitted data and other information to the General Accounting Office to assist its study of delay in National Labor Relations Board proceedings. Conference staff also submitted materials for and participated in two roundtables sponsored by the Congressional Research Service on resolving disputes over land and forest management plans and implementation.

The Conference was especially attentive to the special concerns of independent regulatory commissions. General Counsel Gary Edles spoke about current developments in administrative law at the monthly seminar series of the Nuclear Regulatory Commission's Office of General Counsel. Solicitor General Designate Kenneth W. Starr was the keynote speaker at the Conference's annual Seminar for Regulatory Commissioners. The annual program brings together the members of the numerous multi-member boards and commissions throughout government for a review of current issues of the administrative process. Featured speakers were Janet Hale, Associate Director of the Office of Management and Budget (OMB), who discussed budget priorities as they affect independent agencies, and Curtis L. Wagner, Chief Administrative Law Judge at the Federal Energy Regulatory Commission (FERC), who discussed the successful use of settlement judges at FERC.

The Conference produced a pamphlet entitled *Multi-Member Independent Regulatory Agencies: A Preliminary Survey of their Organization*. The pamphlet provides an introduction to issues of organization common to multi-member agencies, such as the powers of the Chairman, quorum requirements, litigation authority, the requirement of OMB clearance or the authority to bypass OMB review of legislative or budget matters.

AGENCY INTERCHANGE OF INFORMATION

By statute the Conference is directed to "arrange for interchange among administrative agencies of information potentially useful in improving procedure" (5 U.S.C. §574(2)). Each year the Conference serves as a clearinghouse for information on administrative practice and procedure so that agencies can receive the benefit of each other's and the Conference's experience.

A seminar series for the Presidential appointees who serve as members of independent regulatory agencies, begun in 1988, continues to permit the appointees to step away from their everyday work and address common problems of the regulatory process. The program, offered each spring, is the only effort at government-wide training for political appointees regarding the administrative process.

The Conference sponsors roundtables, which allow agency officials to learn about administrative procedure and policy. An added benefit is the opportunity for participants to describe practices at their respective agencies. This year there were several roundtables on ADR and negotiated rulemaking.

In 1989 the Council of Independent Regulatory Agencies, founded by the Conference in 1982, continued its series of breakfast meetings

under the ex officio leadership of Conference Chairman Marshall Breger. Among the speakers at the meetings were Dr. Michael J. Boskin, Chairman of the Council of Economic Advisers, Attorney General Richard Thornburgh, Constance B. Newman, Director of the Office of Personnel Management, and Andrew H. Card, Jr., Assistant to the President and Deputy Chief of Staff.

PUBLICATIONS

The Conference issues several types of publications including reports, sourcebooks, and a newsletter. The Conference's publications reflect the variety of its research interests.

Although only a limited number of copies are available for distribution, *FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK: STATUTES AND RELATED MATERIALS* (1985), remains one of the most requested publications. The *SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION* (1987) is still in stock at the Government Printing Office.

Other publication types include: how-to guides, such as the *MANUAL FOR ADMINISTRATIVE LAW JUDGES* and *A GUIDE TO FEDERAL AGENCY RULEMAKING*; the series *Studies in Administrative Law and Practice*; and special studies of administrative law issues, such as *MULTI-MEMBER INDEPENDENT REGULATORY AGENCIES, A PRELIMINARY SURVEY OF THEIR ORGANIZATION* (1987). The *ADMINISTRATIVE CONFERENCE OF THE UNITED STATES RECOMMENDATIONS AND REPORTS*, published each year, contains copies of the recommendations and their accompanying reports. A bibliography of the 1989 Conference's publications, reports, and articles is on page 131, Appendix F of this annual report.

All Conference publications are available through the Federal Depository Library Program. The Government Printing Office sells some of the books; Appendix F contains all necessary information for purchasing copies. Archival and interlibrary loan copies are retained in the Conference's library at 2120 L Street NW. in Washington, DC. A limited number of copies of recent publications may be available from the Conference on request.

COLLOQUIES

Alternative Dispute Resolution

Coordinated programs to assist the Court of Appeals for the DC Circuit and the U.S. District Court for the District of Columbia began in 1989. The Conference is working with both courts to establish a variety

of mediation and other consensual methods to resolve selected administrative appeals and other cases. Part of the program includes training mediators.

As a co-sponsor with the National Judicial College, the Conference taught a 3-day course in ADR to more than 30 ALJs. Designed to familiarize employees of federal agencies with fundamental issues in the application of ADR, the course included lectures and role-playing sessions.

In October Conference staff and members were prominent at the Society of Professionals in Dispute Resolution's annual conference in Washington. Participation included planning the program, moderating workshops, presenting papers, and serving as panelists.

Drug Approval Process

During a summer colloquy that featured as a panelist Food and Drug Administration Commissioner Dr. Frank Young, issues on economic and health effects of regulation were raised. Dr. Young asked: What are the general issues in developing drugs? Are safety and effectiveness requirements for new drugs really important? What can the nation, and in particular the Conference do? Dr. Young concluded that a better understanding between regulators and those who are ill is critical to resolving these questions.

Other panelists focused on the challenge that AIDS presents to the medical and legal communities. They called for reconsideration of the legal obstacles to getting AIDS drugs to market more quickly and they discussed cost-benefit analysis of speeding up the drug approval process.

Federal Advisory Committees

On May 18 and 19 the Conference co-sponsored with the General Services Administration the Second Annual Conference on Federal Advisory Committee Management. Attended by more than 200 people, the discussions focused on the workings of the federal advisory committee system under the Federal Advisory Committee Act (FACA). Topics included the role of the citizen advisor in adhering to ethical standards, the role of Presidential advisory committees and their effect on the federal decisionmaking process, current policy issues relating to the management and operation of federal advisory committees, and managing the dynamics of FACA in balancing public and private interests.

Federal Trade Commission Reform

Two former FTC chairmen, Lewis Engman and James Miller, were part of a panel offering perspectives on reforms at a fall colloquy. As the first economist to serve as FTC chairman, Mr. Miller's application of economic analysis to antitrust practices allowed for competition, and this, Miller stated, was a boon for consumers.

During his tenure as chairman, Mr. Engman, who is an economist and lawyer, tried to use tools from both disciplines. He cautioned that although economics plays a role in setting policy, policy should not be based solely on economic efficiency.

Sharing Mr. Engman's views that legal precepts are important was law professor and antitrust expert Eleanor Fox. While she supported reforms, Professor Fox impressed upon the audience the need to understand that the principles of law and economics are different.

Savings and Loan Bailout Bill

During the deliberations that led to enactment of the Federal Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989, the Conference sponsored a colloquy on the procedural issues involved in the bailout of the savings and loan industry. Richard C. Breeden, Assistant to the President for Issues Analysis (now Chairman of the Securities and Exchange Commission), Director M. Danny Wall of the Federal Home Loan Bank Board (now the Office of Thrift Supervision), and Professor Lawrence G. Baxter, of Duke University School of Law, led the discussion at the end of May.

Director Wall discussed state-chartered regulatory accountability, the creation of a loan participation task force, the participation of bank holding companies in the thrift industry, the ramifications of the U.S. Supreme Court's decision *Coit Independence Joint Venture v. FSLIC* (dealing with the resolution of claims against savings institution receiver-ships), and the enhanced enforcement authority of the Federal Bank Regulatory Agencies provided for in FIRREA.

Professor Lawrence G. Baxter noted the transition from an "administrative state" into an entrepreneurial state, citing the dramatic increases in the level of enforcement supervision and the use of administrative law techniques for bringing financial institutions into line. Professor Baxter analyzed the legislative proposals underlying FIRREA in light of the *Coit* decision.

Mr. Breeden cautioned against further delay in enactment of savings and loan bailout legislation, noting that each day of delay was costing \$10 to \$12 million. He also spoke about the need to protect capital, and the importance of all insured depository institutions, whether they possess a commercial bank charter or a savings and loan charter, operating with an equivalent level of required control.

The distinguished panel attracted a capacity audience.

BUDGET AND AUTHORIZATION

For the past two fiscal years (1988 and 1989) the Conference appropriation has been \$1,865,000. This is the same amount appropriated for fiscal year 1990. The 1989 budget is summarized below:

Dollar Amounts

1989 appropriation	\$1,865,000
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Appropriation Language

For necessary expenses of the Administrative Conference of the United States, established by the Administrative Conference Act, as amended (5 U.S.C. §571 et seq.), including not to exceed \$1,000 for official reception and representation expenses; \$1,865,000.

Programmatic Application of Funds (in thousands of dollars)

General Administration	409
Personnel Compensation and Benefits	1,235
Formal Recommendations (Research; reports)	96
Implementation and Advisory (Agency assistance)	72
Clearinghouse (Information interchange)	33

Budget Authority	1,845
Outlays	1,823

Reimbursable Programs

Obligation Authority	266
Outlays	184

Totals: Direct and Reimbursable Programs

Obligation Authority	2,111
Outlays	2,007

Personnel Resources--FTEs:	23
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The continued life of the Conference depends on reauthorization, which occurs every 4 years. Programs carried out in the past 4 years (beginning with fiscal year 1987) were done so based on reauthorization approved in 1986. The Conference will be considered for reauthorization in 1990, and this year the Conference submitted its reauthorization request to the Congress (on August 22, 1989). The proposed legislation would extend the Conference's statutory authorization for a 4-year period through the end of fiscal year 1994. As part of its request, the Conference proposed an amendment to the Administrative Conference Act that would permit the Chairman to request that agencies notify him before they enter into procurement contracts to study the efficiency, adequacy or fairness of their agency proceedings. The Conference would be a clearinghouse so agencies avoid duplicating studies already undertaken.



Former Secretary of Transportation and former Council member James Burnley IV (now a public member) making a point at the June plenary.

APPENDICES

- A. Members of the Administrative Conference
- B. Biographical Information
- C. Staff of the Chairman
- D. Organization and Operation
- E. Recommendations and Statements
- F. Conference Publications
- G. Bylaws of the Administrative Conference
- H. The Administrative Conference Act

APPENDIX A - MEMBERS OF THE ADMINISTRATIVE CONFERENCE

THE COUNCIL

Chairman Marshall J. Breger

Vice Chairman (Vacant)

Government Members Phillip D. Brady
Richard C. Breeden¹
Constance Berry Newman¹
Daniel Oliver²
Robert S. Ross, Jr.
Mark Sullivan III³

Public Members Curtis H. Barnette⁴
Harold R. DeMoss, Jr.⁵
Walter Gellhorn
Trudi M. Morrison
R. Carter Sanders
Edward L. Weidenfeld

GOVERNMENT MEMBERS

<i>Department of Agriculture</i>	John Golden
<i>Department of Commerce</i>	Wendell L. Willkie II
	Robert H. Brumley II ²
<i>Commission on Civil Rights</i>	Jeffrey P. O'Connell
	William H. Gillers ²
<i>Commodity Futures Trading Commission</i>	William P. Albrecht
	Marshall E. Hanbury ²
<i>Consumer Product Safety Commission</i>	Anne Graham
<i>Department of Defense</i>	Robert L. Gilliat

<i>(Armed Services Board of Contract Appeals)</i>	Paul E. Williams ⁶
<i>Department of Education</i>	Stephen Y. Winnick
<i>Department of Energy</i>	Stephen A. Wakefield
	Eric J. Fygi ⁷
<i>Environmental Protection Agency</i>	Gerald H. Yamada
	Lawrence J. Jensen ²
<i>Equal Employment</i>	
<i>Opportunity Commission</i>	R. Gaull Silberman
<i>Federal Communications Commission</i>	Robert Pettit
	Diane S. Killory ²
<i>Federal Deposit Insurance Commission</i>	Roger A. Hood
<i>Federal Election Commission</i>	Lawrence M. Noble
<i>Federal Energy Regulatory Commission</i>	Catherine C. Cook
<i>Federal Home Loan Bank Board</i>	Eugene M. Katz ⁸
<i>Federal Maritime Commission</i>	Francis J. Ivancie
	John Robert Ewers ⁷
<i>Federal Reserve System</i>	J. Virgil Mattingly, Jr.
	Michael Bradfield ²
<i>Federal Trade Commission</i>	Terry Calvani
<i>General Services Administration</i>	Robert C. MacKichan
<i>Department of Health and Human Services</i>	Michael J. Astrue
	Darrel J. Grinstead ⁹
	Don M. Newman ²
<i>(Food and Drug Administration)</i>	Frank E. Young
<i>(Social Security Administration)</i>	Eileen Bradley
<i>Department of Housing and</i>	Frank Keating
<i>Urban Development</i>	J. Michael Dorsey ²
<i>(Administrative Law Judge)</i>	Alan W. Heifetz ¹⁰
<i>Department of the Interior</i>	Timothy Glidden
<i>(Inspector General)</i>	James R. Richards ¹¹
<i>Interstate Commerce Commission</i>	Kathleen D. Ribaud
<i>Department of Justice</i>	Kevin R. Jones
<i>Department of Labor</i>	Seth D. Zinman
<i>(Occupational Safety and</i>	Alan C. McMillan
<i>Health Administration)</i>	John A. Pendergrass ²
<i>Merit Systems Protection Board</i>	Daniel R. Levinson
<i>National Aeronautics and</i>	
<i>Space Administration</i>	Edward A. Frankle
<i>National Labor Relations Board</i>	James M. Stephens
	Wilford W. Johansen ²
<i>Nuclear Regulatory Commission</i>	William C. Parler
<i>Occupational Safety and</i>	
<i>Health Review Commission</i>	Earl R. Ohman, Jr.
<i>Office of Management and Budget</i>	S. Jay Plager ⁹

<i>Office of Personnel Management</i>	James S. Green
<i>Securities and Exchange Commission</i>	James M. Strock ²
<i>Small Business Administration</i>	Daniel L. Goelzer
<i>Department of State</i>	Frank S. Swain ²
<i>Department of Transportation</i>	Abraham D. Sofaer
<i>(Federal Aviation Administration)</i>	Neil R. Eisner
<i>Department of the Treasury</i>	Gregory S. Walden
<i>(Internal Revenue Service)</i>	Jeanne S. Archibald
<i>U.S. International Trade Commission</i>	James J. Keightley
<i>U.S. Postal Service</i>	Ronald A. Cass
<i>Department of Veterans Affairs</i>	Stephen Ebbert Alpern
	Cornelius B. Shields
	Frederic L. Conway ⁷

PUBLIC MEMBERS

Warren Belmar	Robert M. Kaufman
George A. Bermann ⁷	Carolyn B. Kuhl
Kenneth J. Bialkin	Richard J. Leighton
Philip C. Bobbitt	Bevis Longstreth
Elliot Bredhoff	James C. Miller III
James H. Burnley, IV	Joseph A. Morris
Joseph A. Cannon	Alan B. Morrison ¹²
Betty Jo Christian ¹²	R. David Pittle
Eldon H. Crowell	Bruce Rabb
Lloyd Norton Cutler	Jonathan Rose
Mitchell E. Daniels, Jr.	Victor G. Rosenblum
Stuart E. Eizenstat	William B. Schultz
Lewis A. Engman	Peter L. Strauss
Daniel F. Evans, Jr. ⁷	Thomas M. Susman ¹²
Frank J. Fahrenkopf, Jr.	Phillip N. Truluck
Fred F. Fielding	Paul R. Verkuil
Ernest Gellhorn	Michael B. Wallace
Michael D. Hawkins	Harris Weinstein
William H. Heyman	Jonathan Weiss
Paul D. Kamenar	Richard S. Williamson
Sally Katzen	

LIAISON REPRESENTATIVES

<i>ABA Administrative Law Section</i>	Philip A. Fleming
<i>ABA National Conference</i>	David I. Harfeld
<i>of Administrative Law Judges</i>	John M. Vittone ⁷
<i>Administrative Office of the U.S. Courts</i>	L. Ralph Mecham
<i>Advisory Commission on</i>	
<i>Intergovernmental Relations</i>	David E. Nething
<i>Council on Environmental Quality</i>	Dinah Bear
<i>Executive Office for Immigration Review</i>	William R. Robie
<i>Federal Administrative</i>	
<i>Law Judges Conference</i>	James P. Timony
<i>Federal Bar Association</i>	Marvin H. Morse
<i>Federal Judicial Center</i>	Charles W. Nihan
<i>Federal Labor Relations Authority</i>	William E. Persina
<i>Federal Mediation & Conciliation Service</i>	Theodore M. Chaskelson
<i>Federal Mine Safety and</i>	
<i>Health Review Commission</i>	Ford B. Ford
<i>General Accounting Office</i>	James F. Hinchman
	Rollee H. Efros ²
<i>Judicial Conference of the U.S.</i>	Stephen G. Breyer
	Kenneth W. Starr ²
<i>Office of the Federal Register</i>	Martha L. Girard
<i>Pension Benefit Guaranty Corporation</i>	Royal F. Dellinger ²
<i>Postal Rate Commission</i>	Henry R. Folsom
	Janet D. Steiger ²
<i>Selective Service System</i>	Henry N. Williams
<i>U. S. Claims Court</i>	Marian Blank Horn
<i>U. S. Court of Appeals, Federal Circuit</i>	Howard T. Markey
<i>U. S. Court of International Trade</i>	Edward D. Re
<i>U. S. Court of Military Appeals</i>	Robinson O. Everett

SENIOR FELLOWS

William H. Allen	Sallyanne Payton
Robert A. Anthony	Reuben B. Robertson III
Clark Byse	Harold L. Russell
H. Clayton Cook, Jr.	Antonin Scalia
Betty Jo Christian ¹³	Loren A. Smith
Kenneth Culp Davis	Otis M. Smith
S. Neil Hosenball	Thomas M. Susman ¹³
Cornelius B. Kennedy	James E. Wesner
Malcolm S. Mason	Richard E. Wiley
Alan B. Morrison ¹³	Jerre S. Williams
Owen Olpin	Frank M. Wozencraft
Max D. Paglin	

SPECIAL COUNSELS

C. Boyden Gray	Alice L. O'Donnell
Darrel J. Grinstead ¹⁴	S. Jay Plager ¹⁴
Edith D. Hakola ⁷	William T. Quillen
Dennis J. Lehr	Ronald E. Robertson
Thomas J. Lykos, Jr. ⁷	Stanley Sporkin
William H. McDavid	John M. Walker, Jr.

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1. Appointed to Council December 14, 1989.
 2. Resigned during 1989.
 3. Resigned from government service during 1989.
 4. Resigned December 14, 1989.
 5. Also served as public member during 1989; appointed to Council December 14, 1989.
 6. Designated Board of Contract Appeals member.
 7. Term of service ended during 1989.
 8. Agency dissolved in 1989; position no longer exists.
 9. Term of service ended during 1989; appointed as special counsel.
 10. Designated Administrative Law Judge.
 11. Designated Inspector General.
 12. Became senior fellow during 1989.
 13. Also served as public member during 1989.
 14. Also served as government member during 1989.



Public member and partner in the law firm of Powell, Goldstein, Frazer and Murphy, Stuart Eizenstat rereading proposed recommendation during December plenary session.



Associate Solicitor at the Department of Labor Seth Zinman and Consultant Richard Berg, former Conference General Counsel, deep in thought at December plenary session.

APPENDIX B - BIOGRAPHICAL INFORMATION

MEMBERS*

William P. Albrecht, Commissioner, Commodity Futures Trading Commission, Washington, DC. Appointed as Government Member May 18, 1989. Committee on Adjudication.

William H. Allen, Esquire, Member of the law firm of Covington & Burling, Washington, DC. Public Member 1972-82. Senior Fellow since 1982. Committee on Judicial Review.

Stephen Ebbert Alpern, Associate General Counsel for Labor Law, U.S. Postal Service, Washington, DC. Government Member since 1988. Committee on Administration.

Robert A. Anthony, Professor of Law, George Mason University School of Law, Arlington, VA. Chairman of the Administrative Conference of the United States 1974-79. Consultant on: comparative proceedings for broadcast licensing, 1970-71; confidential information in ITC cases (Recommendation 84-6); judicial deference to agency interpretations (Recommendation 89-5). Senior Fellow since 1982. Committee on Regulation.

Jeanne S. Archibald, Deputy General Counsel, Department of the Treasury, Washington, DC. Government Member since 1988. Special Committee on Financial Services; Advisory Committee on Administrative Procedures Under the U.S.-Canada Free Trade Agreement.

Michael J. Astrue, General Counsel, Department of Health and Human Services, Washington, DC. Appointed as Government Member July 24, 1989. Committee on Regulation.

Curtis H. Barnette, Senior Vice President, General Counsel and Secretary, Bethlehem Steel Corporation, Bethlehem, PA. Served as Council Member 1988-89. Committee on Governmental Processes; Advisory Committee on Administrative Procedures Under the U.S.-Canada Free Trade Agreement.

Dinah Bear, General Counsel, Council on Environmental Quality, Washington, DC. Liaison Representative since 1986. Committee on Administration.

Warren Belmar, Esquire, Member of the law firm of Fulbright & Jaworski, Washington, DC. Public Member since 1986. Committee on Judicial Review; Special Committee on Financial Services.

George A. Bermann, Professor of Law, Columbia University School of Law, New York, NY. Consultant on governmental torts (Recommendation 84-7). Public Member 1986-89. Committee on Administration; Advisory Committee on Administrative Procedures Under the U.S.-Canada Free Trade Agreement.

Kenneth J. Bialkin, Esquire, Member of the law firm of Skadden, Arps, Slate, Meagher & Flom, New York, NY. Public Member since 1986. Special Committee on Financial Services (Chairman).

Philip C. Bobbitt, Professor of Law, University of Texas Law School, Austin, TX. Public Member since 1987. Committee on Adjudication; Special Committee on Ethics in Government.

*During calendar year 1989. Affiliations and positions are listed as of December 31 or the date of termination of Conference service, if earlier.

Michael Bradfield, General Counsel, Board of Governors of the Federal Reserve System, Washington, DC. Government Member 1981-89. Committee on Regulation; Special Committee on Financial Services.

Eileen Bradley, Esquire, Associate Commissioner, Social Security Administration, Department of Health and Human Services, Washington, DC. Appointed as Government Member May 31, 1989. Committee on Adjudication.

Phillip D. Brady, General Counsel, Department of Transportation, Washington, DC. Council Member since 1988. Special Committee on Ethics in Government.

Elliot Bredhoff, Esquire, Senior Partner in the law firm of Bredhoff & Kaiser, Washington, DC. Public Member since 1988. Committee on Adjudication.

Richard C. Breeden, Esquire, Chairman, Securities and Exchange Commission, Washington, DC. Appointed Council Member December 14, 1989. Special Committee on Financial Services.

Marshall J. Breger, Chairman of the Administrative Conference of the United States since 1985.

Stephen G. Breyer, Judge, United States Court of Appeals for the First Circuit, Boston, MA. Liaison Representative (Judicial Conference of the U.S.) since 1981. Committee on Adjudication.

Robert H. Brumley II, Acting General Counsel, Department of Commerce, Washington, DC. Government Member 1987-89. Special Committee on Financial Services; Advisory Committee on Administrative Procedures Under the U.S.-Canada Free Trade Agreement.

James H. Burnley IV, Esquire, Member of the law firm of Shaw, Pittman, Potts & Trowbridge, Washington, DC. Council Member 1987-88. Public member since 1988. Committee on Rulemaking.

Clark Byse, Professor Emeritus, Harvard Law School, Cambridge, MA. Public Member 1968-82; Senior Fellow since 1982. Committee on Administration.

Terry Calvani, Commissioner, Federal Trade Commission, Washington, DC. Government Member since 1985. Committee on Rulemaking.

Joseph A. Cannon, Esquire, President, Geneva Steel Corporation, Provo, UT. Government Member (Environmental Protection Agency) 1981-83. Public Member since 1988. Committee on Regulation.

Ronald A. Cass, Commissioner, U.S. International Trade Commission, Washington, DC. Consultant on: review of ALJ decisions (Recommendation 83-3); Federal Tort Claims Act's discretionary function exception, 1986-87. Government Member since 1988. Committee on Adjudication.

Theodore M. Chaskelson, General Counsel, Federal Mediation and Conciliation Service, Washington, DC. Liaison Representative since 1988. Committee on Administration.

Betty Jo Christian, Esquire, Member of the law firm of Steptoe & Johnson, Washington, DC. Government Member (ICC) 1977-79; Public Member 1980-89. Appointed Senior Fellow August 8, 1989. Committee on Regulation.

Frederic L. Conway, Special Assistant to the General Counsel, Department of Veterans Affairs, Washington, DC. Government Member 1983-89. Committee on Administration.

Catherine C. Cook, General Counsel, Federal Energy Regulatory Commission, Washington, DC. Government Member since 1987. Committee on Regulation.

H. Clayton Cook, Jr., Esquire, Member of the law firm of Bishop, Cook, Purcell & Reynolds, Washington, DC. Public Member 1980-88. Senior Fellow since 1988; Committee on Administration.

Eldon H. Crowell, Esquire, Senior Partner in the law firm of Crowell & Moring, Washington, DC. Consultant on: use of minitrials in federal contract disputes, 1986-87; alternatives for resolving government contract disputes (Recommendation 87-11). Public Member since 1986. Committee on Administration.

Lloyd Norton Cutler, Esquire, Senior Partner in the law firm of Wilmer, Cutler & Pickering, Washington, DC. Public Member since 1986. Special Committee on Ethics in Government.

Mitchell E. Daniels, Jr., President and Chief Executive Officer, Hudson Institute, Indianapolis, IN. Public Member since 1987. Committee on Judicial Review.

Kenneth Culp Davis, Professor of Law, University of San Diego School of Law, San Diego, CA. Public Member 1968-82; Senior Fellow since 1982. Committee on Rulemaking.

Royal F. Dellinger, Deputy Executive Director, Pension Benefit Guaranty Corporation, Washington, DC. Liaison Representative 1985-89. Committee on Administration.

Harold R. DeMoss, Jr., Esquire, Partner in the law firm of Bracewell & Patterson, Houston, TX. Appointed Public Member January 26, 1989; Committee on Governmental Processes; appointed Council Member December 14, 1989; Committee on Rulemaking.

Anne E. Dewey, General Counsel, Farm Credit Administration, Washington, DC. Appointed as Liaison Representative July 1, 1989. Special Committee on Financial Services.

J. Michael Dorsey, General Counsel, Department of Housing and Urban Development, Washington, DC. Government Member 1987-89. Committee on Governmental Processes.

Rollee H. Efros, Associate General Counsel, General Accounting Office, Washington, DC. Liaison Representative 1984-89. Committee on Administration.

Neil R. Eisner, Assistant General Counsel, Department of Transportation, Washington, DC. Government Member since 1982. Committee on Governmental Processes (Vice Chairman); Model Rules Working Group.

Stuart E. Eizenstat, Esquire, Partner in the law firm of Powell, Goldstein, Frazer & Murphy, Washington, DC. Appointed Public Member September 20, 1989. Committee on Administration.

Lewis A. Engman, Esquire, Member of the law firm of Winston & Strawn, Washington, DC. Public Member since 1986. Committee on Governmental Processes.

Daniel F. Evans, Jr., Esquire, Member of the law firm of Baker & Daniels, Indianapolis, IN. Public Member 1984-89. Committee on Rulemaking.

Robinson O. Everett, Chief Judge, United States Court of Military Appeals, Washington, DC. Liaison Representative since 1984. Committee on Governmental Processes.

John Robert Ewers, Director, Bureau of Administration, Federal Maritime Commission, Washington, DC. Government Member 1985-89. Committee on Rulemaking.

Frank J. Fahrenkopf, Jr., Esquire, Member of the law firm of Hogan & Hartson, Washington, DC. Public Member since 1986. Committee on Governmental Processes.

Fred F. Fielding, Esquire, Senior Partner in the law firm of Wiley, Rein & Fielding, Washington, DC. Special Counsel 1981-86; Public Member since 1986. Special Committee on Ethics in Government (Chairman).

Phillip A. Fleming, Esquire, Partner in the law firm of Crowell & Moring, Washington, DC. Liaison Representative (ABA Section on Administrative Law) since 1988. Committee on Regulation.

Henry R. Folsom, Vice Chairman, Postal Rate Commission, Washington, DC. Appointed as Liaison Representative August 30, 1989. Committee on Rulemaking.

Ford B. Ford, Chairman, Federal Mine Safety and Health Review Commission, Washington, DC. Liaison Representative since 1986. Committee on Regulation.

Edward A. Frankle, General Counsel, National Aeronautics and Space Administration, Washington, DC. Government Member since 1988. Committee on Administration.

Eric J. Fygl, Deputy General Counsel, Department of Energy, Washington, DC. Government Member 1988-89. Committee on Judicial Review.

Ernest Gellhorn, Esquire, Member of the law firm of Jones, Day, Reavis & Pogue, Los Angeles, CA. Consultant on: summary judgment in administrative adjudication (Recommendation 70-3); interlocutory appeal procedures (Recommendation 71-1); public participa-

tion in administrative hearings (Recommendation 71-6); adverse agency publicity (Recommendation 73-1); and legislative veto (Recommendation 77-1). Public Member since 1986. Committee on Rulemaking (Chairman).

Walter Gellhorn, Professor Emeritus, Columbia University School of Law, New York, NY. Council Member since 1968. Committee on Administration.

William H. Gillers, Solicitor, United States Commission on Civil Rights, Washington, DC. Government Member 1986-89. Committee on Administration.

Robert L. Gilliat, Assistant General Counsel, Department of Defense, Washington, DC. Government Member since 1977. Committee on Adjudication.

Martha L. Girard, Director, Office of the Federal Register, National Archives and Records Administration, Washington, DC. Appointed as Liaison Representative March 31, 1989. Committee on Administration.

Timothy Glidden, Esquire, Counselor to the Secretary, Department of Interior, Washington, DC. Appointed Government Member May 23, 1989. Committee on Rulemaking.

Daniel L. Goelzer, General Counsel, Securities & Exchange Commission, Washington, DC. Government Member since 1988. Committee on Adjudication.

John Golden, Associate General Counsel, Department of Agriculture, Washington, DC. Government Member since 1983. Committee on Regulation (Chairman).

Anne Graham, Chairman, Consumer Product Safety Commission, Washington, DC. Government Member since 1988. Committee on Governmental Processes.

C. Boyden Gray, Counsel to the President, Washington, DC. Special Counsel since 1981. Committee on Judicial Review; Special Committee on Financial Services.

James S. Green, Acting General Counsel, Office of Personnel Management, Washington, DC. Appointed Government Member August 7, 1989. Committee on Governmental Processes.

Darrel J. Grinstead, Assistant General Counsel, Department of Health and Human Services, Washington, DC. Government Member 1979-82, 1984-89. Appointed Special Counsel September 20, 1989. Committee on Administration (Chairman).

Edith D. Hakola, General Counsel, National Right to Work Legal Defense Foundation, Inc., Springfield, VA. Council Member 1981-88. Special Counsel 1988-89. Committee on Adjudication.

Marshall E. Hanbury, General Counsel, Commodity Futures Trading Commission, Washington, DC. Government Member 1987-89. Committee on Adjudication.

David I. Harfeld, Administrative Law Judge, Federal Energy Regulatory Commission, Washington, DC. Appointed as Liaison Representative (ABA National Conference of Administrative Law Judges) October 23, 1989. Committee on Rulemaking.

Michael D. Hawkins, Esquire, Member of the law firm of Bryan, Cave, McPheeters & McRoberts, Phoenix, AZ. Public Member since 1988. Committee on Rulemaking.

Alan W. Helfetz, Chief Administrative Law Judge, Department of Housing and Urban Development, Washington, DC. Government Member (designated ALJ) since 1986. Committee on Adjudication; Model Rules Working Group (Chairman).

William H. Heyman, Esquire, Managing Director, Smith Barney Harris Upham Co., Inc., New York, NY. Appointed Public Member June 7, 1989. Special Committee on Financial Services.

James F. Hinchman, General Counsel, U.S. General Accounting Office, Washington, DC. Appointed as Liaison Representative October 19, 1989. Committee on Administration.

Roger A. Hood, Assistant General Counsel, Federal Deposit Insurance Corporation, Washington, DC. Government Member since 1982. Committee on Governmental Processes; Special Committee on Financial Services.

Marian Blank Horn, Judge, United States Claims Court, Washington, DC. Government Member (Interior) 1984-86; Liaison Representative since 1986. Committee on Governmental Processes.

S. Neil Hosenball, Esquire, Member of the law firm of Davis, Graham & Stubbs, Washington, DC. Government Member (NASA) 1968-85; Senior Fellow since 1985. Committee on Administration.

Francis J. Ivancie, Commissioner, Federal Maritime Commission, Washington, DC. Appointed Government Member August 2, 1989. Committee on Rulemaking.

Lawrence J. Jensen, General Counsel, Environmental Protection Agency, Washington, DC. Government Member 1988-89. Committee on Regulation.

Wilford W. Johansen, Member, National Labor Relations Board, Washington, DC. Government Member 1985-89. Committee on Rulemaking.

Kevin R. Jones, Deputy Assistant Attorney General, Office of Legal Policy, Department of Justice, Washington, DC. Government Member since 1988. Committee on Governmental Processes.

Paul D. Kamenar, Esquire, Director of Litigation, Washington Legal Foundation, Washington, DC. Public Member since 1982. Committee on Rulemaking.

Eugene M. Katz, Director, Office of the General Counsel, Federal Home Loan Bank Board, Washington, DC. Government Member 1988-89. Special Committee on Financial Services.

Sally Katzen, Esquire, Member of the law firm of Wilmer, Cutler, & Pickering, Washington, DC. Public Member since 1988. Committee on Judicial Review (Vice Chairman).

Robert M. Kaufman, Esquire, member of the law firm of Proskauer, Rose, Goetz & Mendelsohn, New York, NY. Public Member since 1988. Committee on Regulation.

Frank Keating, General Counsel, Department of Housing and Urban Development, Washington, DC. Appointed Government Member June 5, 1989. Committee on Administration; Special Committee on Financial Services.

James J. Keightley, Associate Chief Counsel (Litigation), Internal Revenue Service, Washington, DC. Government Member since 1986. Committee on Regulation.

Cornelius B. Kennedy, Esquire, McLean, VA. Public Member 1972-82; Senior Fellow since 1982. Committee on Rulemaking.

Diane S. Killory, General Counsel, Federal Communications Commission, Washington, DC. Government Member 1987-89. Committee on Rulemaking.

Carolyn B. Kuhl, Esquire, Member of the law firm of Munger, Tolles, & Olson, Los Angeles, CA. Public Member since 1986. Committee on Administration.

Dennis J. Lehr, Esquire, Member of the law firm of Hogan & Hartson, Washington, DC. Special Counsel since 1987. Special Committee on Financial Services.

Richard J. Leighton, Esquire, Member of the law firm of Leighton & Regnery, Washington, DC. Public Member since 1983. Committee on Adjudication (Chairman); Model Rules Working Group.

Daniel R. Levinson, Chairman, Merit Systems Protection Board, Washington, DC. Government Member (OPM) 1985; Liaison Representative 1986; Government Member (MSPB) since 1987. Committee on Governmental Processes.

Bevis Longstreth, Esquire, Member of the law firm of Debevoise & Plimpton, New York, NY. Government Member (SEC) 1982-84; Public Member since 1986. Special Committee on Financial Services.

Thomas J. Lykos, Jr., Esquire, Minority Counsel, Securities Subcommittee, Senate Committee on Banking, Housing and Urban Affairs, Washington, DC. Special Counsel 1987-89. Special Committee on Financial Services.

Robert C. MacKichan, Jr., General Counsel, General Services Administration, Washington, DC. Liaison Representative (ACTION), 1985-87; Government Member since 1988. Committee on Judicial Review; Special Committee on Ethics in Government.

Howard T. Markey, Chief Judge, United States Court of Appeals for the Federal Circuit, Washington, DC. Liaison Representative since 1982. Committee on Judicial Review; Committee on Governmental Processes.

Malcolm S. Mason, Attorney-at-Law, Washington, DC. Government Member (OEO) 1968-73, (HEW) 1973-79; Senior Fellow since 1984. Since 1985, consultant on handbook for drafting of federal grant statutes. Committee on Administration.

J. Virgil Mattingly, Jr., General Counsel, Board of Governors of the Federal Reserve System, Washington, DC. Appointed Government Member March 22, 1989. Special Committee on Financial Services.

Alan C. McMillan, Esquire, Deputy Assistant Secretary, Occupational Safety & Health Administration, Department of Labor, Washington, DC. Appointed Government Member May 12, 1989. Committee on Regulation.

William H. McDavid, General Counsel, Chemical Banking Corporation, New York, NY. Special Counsel since 1987. Special Committee on Financial Services.

L. Ralph Mecham, Esquire, Director, Administrative Office of the U.S. Courts, Washington, DC. Liaison Representative since 1985. Committee on Adjudication.

James C. Miller III, Ph.D Citizens for a Sound Economy, Washington, DC. Council Member 1981-88 (Vice Chairman 1987-88); Public Member since 1988. Committee on Regulation.

Joseph A. Morris, Esquire, Partner in the law firm of Morris, Rathnau & De La Rosa, Chicago, IL. Government Member (OPM) 1981-85; Liaison Representative (USIA) 1986; Special Counsel 1987-88. Public Member since 1988. Committee on Judicial Review.

Alan B. Morrison, Esquire, Director, Public Citizen Litigation Group, Washington, DC. Public Member 1980-89. Appointed Senior Fellow August 8, 1989. Committee on Governmental Processes; Special Committee on Ethics in Government.

Trudi M. Morrison, Esquire, President, The Morrimount Corporation, Detroit, MI Council Member since 1988. Committee on Governmental Processes; Special Committee on Ethics in Government.

Marvin H. Morse, Administrative Law Judge, Office of the Chief Administrative Hearing Officer, Department of Justice, Falls Church, VA. Government Member (OPM) 1980-82, (SBA) 1982-84; Liaison Representative 1985-87 (ABA National Conference of ALJs); Liaison Representative (Federal Bar Association) since 1988. Committee on Adjudication.

David E. Nething, North Dakota State Senate, Jamestown, ND. Liaison Representative (Advisory Commission on Intergovernmental Relations) since 1983. Committee on Regulation.

Constance Berry Newman, Director, Office of Personnel Management, Washington, DC. Government Member (CPSC) 1973-76; Public Member 1979-80. Appointed Council Member December 14, 1989. Committee on Administration.

Don M. Newman, Under Secretary, Department of Health and Human Services, Washington, DC. Government Member 1987-89. Committee on Adjudication.

Charles W. Nihan, Esquire, Deputy Director, Federal Judicial Center, Washington, DC. Liaison Representative since 1984. Committee on Judicial Review.

Lawrence M. Noble, General Counsel, Federal Election Commission, Washington, DC. Government Member since 1988. Committee on Judicial Review.

Jeffrey P. O'Connell, Acting Solicitor, U.S. Commission on Civil Rights, Washington, DC. Appointed Government Member September 19, 1989. Committee on Administration; Special Committee on Ethics in Government.

Alice L. O'Donnell, Esquire, Director, Division of Interjudicial Affairs and Information Services, Federal Judicial Center, Washington, DC. Liaison Representative 1976-84; Special Counsel since 1984. Committee on Judicial Review.

Daniel Oliver, Chairman, Federal Trade Commission, Washington, DC. Government Member (Education) 1983; Council Member 1983-89. Committee on Adjudication.

Earl R. Ohman, Jr., General Counsel, Occupational Safety and Health Review Commission, Washington, DC. Government Member since 1988. Committee on Judicial Review.

Owen Olpin, Esquire, Member of the law firm of O'Melveny & Myers, Los Angeles, CA. Public Member 1972-82; Senior Fellow since 1982. Committee on Regulation.

Max D. Paglin, Attorney-at-Law, Washington, DC. Government Member (FCC) 1968-72, (Atomic Energy Commission) 1972-74, (NRC) 1974-75. Consultant on: implementation of ACUS recommendations (1975-76); natural gas shortages (Statement 5 - 1976);

management seminars for agency officials (1976); agency procedural review (1977). Public Member 1978-82; Senior Fellow since 1982. Committee on Judicial Review.

William C. Parler, General Counsel, Nuclear Regulatory Commission, Washington, DC. Government Member since 1987. Committee on Rulemaking.

Sallyanne Payton, Professor, University of Michigan School of Law, Ann Arbor, MI. Public Member 1980-88. Senior Fellow since 1988. Committee on Rulemaking.

John A. Pendergrass, Esquire, Assistant Secretary for Occupational Safety & Health Administration, Department of Labor, Washington, DC. Government Member 1987-89. Committee on Regulation.

William E. Persina, Acting Solicitor, Federal Labor Relations Authority, Washington, DC. Liaison Representative since 1988. Committee on Adjudication.

Robert Pettit, General Counsel, Federal Communications Commission, Washington, DC. Appointed Government Member October 25, 1989. Committee on Judicial Review.

R. David Pittle, Ph.D., Technical Director, Consumers Union of the United States, Mount Vernon, NY. Government Member (CPSC) 1981-82; Public Member since 1988. Committee on Governmental Processes.

S. Jay Plager, Judge, U.S. Court of Appeals for the Federal Circuit. Government Member (OMB) 1988-89; Committee on Rulemaking. Appointed Special Counsel December 28, 1989; Committee on Governmental Processes.

William T. Quillen, Esquire, Vice President and General Counsel, Howard Hughes Medical Institute, Bethesda, MD. Public Member 1982-86; Special Counsel since 1986. Committee on Adjudication.

Bruce Rabb, Esquire, Member of the law firm of Stroock, Stroock & Lavan, New York, NY. Public Member 1982-86; Special Counsel 1986-88; Public Member since 1988. Committee on Adjudication; Special Committee on Financial Services.

Edward D. Re, Chief Judge, United States Court of International Trade, New York, NY. Liaison Representative since 1984. Committee on Rulemaking.

Kathleen D. Ribaud, Senior Staff Counsel, Interstate Commerce Commission, Washington, DC. Government Member since 1988. Committee on Judicial Review.

James R. Richards, Esquire, Inspector General, Department of the Interior, Washington, DC. Government Member (Energy) 1984-86; (designated Inspector General since 1987). Committee on Governmental Processes; Special Committee on Ethics in Government.

Ronald E. Robertson, Professor, School of Law, Pepperdine University, Malibu, CA. Public Member 1982-85; Special Counsel since 1986; Special Committee on Ethics in Government.

Reuben B. Robertson III, Esquire, Member of the law firm of Ingersoll & Bloch, Washington, DC. Chairman of the Administrative Conference of the United States 1980-81; Senior Fellow since 1982. Committee on Adjudication.

William R. Roble, Chief Immigration Judge, Executive Office for Immigration Review, Department of Justice, Falls Church, VA. Liaison Representative since 1984. Committee on Rulemaking (Vice Chairman); Model Rules Working Group.

Jonathan Rose, Associate Dean, College of Law, Arizona State University, Tempe, AZ. Consultant on nonlegal representation before federal agencies (1982-84). Appointed Public Member July 1, 1989. Committee on Regulation.

Victor G. Rosenblum, Professor of Law, Northwestern University School of Law, Chicago, IL. Consultant on: citizen complaints (1971); ALJ study (1974-76); and evaluation of ALJ performance (1979-85). Public Member since 1982. Committee on Administration; Advisory Committee on Administrative Procedures Under the U.S.-Canada Free Trade Agreement (Chairman).

Robert S. Ross, Jr., Executive Assistant to the Attorney General, Department of Justice, Washington, DC. Appointed Council Member January 18, 1989. Committee on Adjudication.

Harold L. Russell, Esquire, Member of the law firm of Smith, Gambrell & Russell, Atlanta, GA. Council Member 1968-77; Senior Fellow since 1983. Committee on Judicial Review.

Raymond Carter Sanders, Jr., Esquire, Senior Partner, Sanders & Associates, Arlington, VA. Council Member since 1988. Committee on Judicial Review.

Antonin Scalia, Associate Justice, United States Supreme Court, Washington, DC. Chairman of the Administrative Conference of the United States 1972-74; Public Member 1978-82; Senior Fellow since 1982. Committee on Governmental Processes.

William B. Schultz, Esquire, Public Citizen Litigation Group, Washington, DC. Appointed Public Member July 1, 1989. Committee on Regulation.

Cornelius B. Shields, Special Assistant to the General Counsel, Department of Veterans Affairs, Washington, DC. Appointed Government Member November 13, 1989. Committee on Administration.

R. Gauli Silberman, Vice Chairman, Equal Employment Opportunity Commission, Washington, DC. Government Member since 1988. Committee on Governmental Processes.

Loren A. Smith, Chief Judge, United States Claims Court, Washington, DC. Chairman of the Administrative Conference of the United States 1981-85; Senior Fellow since 1985. Committee on Judicial Review.

Otis M. Smith, Esquire, Member of the law firm of Lewis, White & Clay, Detroit, MI. Public Member 1972-78; Council Member 1978-88; Senior Fellow since 1988. Committee on Judicial Review.

Abraham D. Sofaer, Legal Adviser, Department of State, Washington, DC. Consultant on change-of-status applications to INS (Recommendation 71-5). Government Member since 1985. Committee on Adjudication; Advisory Committee on Administrative Procedures Under the U.S.-Canada Free Trade Agreement.

Stanley Sporkin, Judge, United States District Court for the District of Columbia, Washington, DC. Liaison Representative (CIA) 1982-85; Special Counsel since 1986. Committee on Rulemaking; Special Committee on Financial Services (Vice Chairman).

Kenneth W. Starr, Judge, U.S. Court of Appeals for the District of Columbia, Washington, DC. Liaison Representative (Judicial Conference) 1988-89. Committee on Judicial Review.

Janet D. Steiger, Chair, Postal Rate Commission, Washington, DC. Liaison Representative 1981-89. Committee on Rulemaking.

James M. Stephens, Esquire, Chairman, National Labor Relations Board, Washington, DC. Appointed Government Member September 15, 1989. Committee on Rulemaking.

Peter L. Strauss, Professor of Law, Columbia University School of Law, New York, NY. Consultant on: mining claims on public lands (Recommendation 74-3); impact of judicial review on rulemaking (1977-78); and disqualification of decisional officials (Recommendation 80-4). Government Member (NRC) 1976-77; Public Member since 1982. Committee on Judicial Review (Chairman, Vice Chairman).

James M. Strock, General Counsel, Office of Personnel Management, Washington, DC. Government Member 1988-89. Committee on Governmental Processes.

Mark Sullivan III, Associate Director, Presidential Personnel, The White House, Washington, DC. Council Member 1986-89. Committee on Judicial Review; Special Committee on Financial Services.

Thomas M. Susman, Esquire, Member of the law firm of Ropes & Gray, Washington, DC. Public Member 1980-89; Committee on Judicial Review (Chairman) Appointed Senior Fellow September 13, 1989; Committee on Governmental Processes.

Frank S. Swain, Chief Counsel for Advocacy, Small Business Administration, Washington, DC. Government Member 1982-89. Committee on Regulation.

James P. Timony, Administrative Law Judge, Federal Trade Commission, Washington, DC. Liaison Representative (Federal Administrative Law Judges Conference) since 1988. Committee on Judicial Review.

Phillip N. Truluck, Executive Vice President, The Heritage Foundation, Washington, DC. Public Member since 1986. Committee on Rulemaking; Special Committee on Ethics in Government.

Paul R. Verkuil, Esquire, President, College of William and Mary, Williamsburg, VA. Consultant on: pre-enforcement judicial review of rules (Recommendation 74-4); informal adjudication (1975-76); intergovernmental communications in informal rulemaking (Recommendation 80-6); Regulatory Flexibility Act (1981); judicial review of rules in enforcement proceedings (Recommendation 82-7); and immigration adjudications (1983-84). Public Member since 1982. Committee on Governmental Processes; Committee on Rulemaking.

John M. Vittone, Administrative Law Judge, Department of Labor, Washington, DC. Liaison Representative (ABA National Conference of Administrative Law Judges) 1988-89. Committee on Rulemaking; Model Rules Working Group.

Stephen A. Wakefield, General Counsel, Department of Energy, Washington, DC. Appointed Government Member December 11, 1989. Committee on Judicial Review.

Gregory S. Walden, Chief Counsel, Federal Aviation Administration, Department of Transportation, Washington, DC. Government Member since 1988. Committee on Rulemaking.

John M. Walker, Jr., Circuit Judge, United States Court of Appeals for the Second Circuit, New York, NY. Special Counsel since 1986. Committee on Regulation; Special Committee on Financial Services; Advisory Committee on Administrative Procedures Under the U.S.-Canada Free Trade Agreement.

Michael B. Wallace, Esquire, Member of the firm Phelps, Dunbar, Marks, Clazerie & Simms of Jackson, MS. Public Member since 1987. Committee on Regulation.

Edward L. Weidenfeld, Esquire, Partner in the law firm of Weidenfeld & Rooney, Washington, DC. Council Member since 1981. Committee on Regulation.

Harris Weinstein, Esquire, Member of the law firm of Covington & Burling, Washington, DC. Public Member since 1982. Committee on Governmental Processes (Chairman).

Jonathan A. Weiss, Esquire, Director, Legal Services for the Elderly Poor, New York, NY. Public Member since 1987. Committee on Adjudication.

James E. Wesner, General Counsel, University of Cincinnati, Cincinnati, OH. Public Member 1974-82; Senior Fellow since 1982. Committee on Adjudication.

Richard E. Wiley, Esquire, Senior Partner in the law firm of Wiley, Rein & Fielding, Washington, DC. Council Member 1973-77; Public Member 1979-84; Senior Fellow since 1984. Committee on Governmental Processes.

Henry N. Williams, General Counsel, Selective Service System, Washington, DC. Government Member (SSS) 1971-75; Liaison Representative since 1975. Committee on Adjudication.

Jerre S. Williams, Judge, United States Court of Appeals for the Fifth Circuit, Austin, TX. Chairman of the Administrative Conference of the United States 1968-70; Public Member 1972-78; Senior Fellow since 1982. Committee on Judicial Review.

Paul E. Williams, Esquire, Chairman, Armed Services Board of Contract Appeals, Department of Defense, Falls Church, VA. Government Member since 1988. Committee on Administration.

Richard S. Williamson, Esquire, Partner in the law firm of Mayer, Brown & Platt, Chicago, IL. Council Member (Vice Chairman) 1981-83; Appointed Public Member July 1, 1989. Committee on Judicial Review.

Wendell L. Willkie II, General Counsel, Department of Commerce, Washington, DC. Government Member (Education) 1986-88. Reappointed Government Member April 5, 1989. Special Committee on Financial Services.

Steven Y. Winnick, Acting General Counsel, Department of Education, Washington, DC. Appointed Government Member May 30, 1989. Committee on Administration.

Frank M. Wozencraft, Esquire, Member of the law firm of Baker & Botts, Houston, TX. Council Member (Vice Chairman) 1968-71; Public Member 1975-80; Senior Fellow since 1982. Committee on Regulation.

Gerald H. Yamada, Acting General Counsel, Environmental Protection Agency, Washington, DC. Appointed Government Member February 27, 1989. Committee on Regulation.

Frank E. Young, M.D., Ph.D., Deputy Assistant Secretary for Health, Science and Environment, Department of Health and Human Services, Washington, DC.; former Commissioner, Food and Drug Administration, Department of Health and Human Services, Rockville, MD. Government Member since 1987. Committee on Rulemaking.

Seth D. Zinman, Associate Solicitor, Department of Labor, Washington, DC. Government Member since 1981. Committee on Judicial Review.

RESEARCH CONSULTANTS

David R. Anderson, Esquire, Arlington, VA. Consultant on: potential uses of ombudsmen in federal programs.

Frederick R. Anderson, Professor of Law, Washington College of Law, American University, Washington, DC. Consultant on: revolving funds for remedial and compensatory purposes.

Robert A. Anthony, Professor of Law, George Mason University School of Law, Arlington, VA. Chairman of the Administrative Conference (1974-79). Consultant on: handling of confidential information in international trade cases (Recommendation 84-6); achieving judicial acceptance of agency statutory interpretations (Recommendation 89-5).

Michael Baram, Director, Center for Law & Technology, Boston University School of Law, Boston, MA. Consultant on: public disclosure concerning use of cost-benefit and similar analyses in regulation (Recommendation 79-4); risk communication as a regulatory approach.

Lawrence G. Baxter, Professor of Law, Duke University School of Law, Durham, NC. Consultant on: resolution of claims against savings receiverships (Recommendation 88-8); enforcement procedures of banking agencies.

Richard J. Bednar, Esquire, Member of the law firm of Crowell & Moring, Washington, DC. Pro bono consultant on: use of ADR by agency contracting officers (Recommendation 89-2).

Richard K. Berg, Senior Counsel, Multinational Legal Services, PC, Washington, DC. General Counsel of the Administrative Conference (1971-87). Consultant on: subpoena powers in formal agency proceedings (Recommendation 74-1); statutory and regulatory inhibitions to agency use of arbitration (1987-88); application of conflict-of-interest laws to federal advisory committee members (Recommendation 89-3).

George A. Bermann, Professor of Law, Columbia University School of Law, New York, NY. Public member of the Administrative Conference (1986-89). Consultant on: administrative handling of federal tort claims (Recommendation 84-7); U.S. participation in international standard setting.

Charles A. Bethel, Mediator, Takoma Park, MD. Consultant on: training of federal officials in alternative dispute resolution.

Frank S. Bloch, Professor, Vanderbilt University School of Law, Nashville, TN. Consultant on: use of medically trained deciders in disability cases (Recommendation 89-10); comparison of federal disability program appeals processes.

Harold H. Bruff, Professor of Law, University of Texas School of Law, Austin, TX. Consultant on: mandatory retirement of presidential appointees (Recommendation 76-1); legislative veto (Recommendation 77-1); arbitration in federal programs (Recommendation 87-5); presidential review of agency rulemaking (Recommendation 88-9); allocation of adjudicative responsibilities between agencies and courts.

Michael P. Cox, Dean, Thomas M. Cooley Law School, Lansing, MI. Consultant on: discipline of attorneys practicing before federal agencies (Statement 8 - 1982); feasibility of a center for state administrative law (1986); model rules of practice for agency adjudication.

William J. Davey, Professor of Law, Fordham University, New York, NY. Consultant on: procedures for antidumping and countervailing duty cases (with Professor Jackson).

Robert N. Davis, Professor of Law, Washington and Lee University School of Law, Lexington, VA. Consultant on: choice of forum in government contract litigation.

E. Donald Elliott, Professor of Law, Yale Law School, New Haven, CT. (Now General Counsel, Environmental Protection Agency.) Consultant on: judicial remands of cases to administrative agencies (with Professor Schuck).

Samuel Estreicher, Professor of Law, New York University School of Law, New York, NY. Consultant on: federal agency nonacquiescence in decisions of reviewing courts (with Professor Revesz).

Jonathan L. Entin, Professor of Law, Case Western Reserve University Law School, Cleveland, OH. Consultant on: the Department of Housing and Urban Development's administrative grievance procedures for public housing tenants.

Richard H. Fallon, Professor of Law, Harvard University Law School, Cambridge, MA. Consultant on: the FAA's sanction and enforcement procedures.

Margaret G. Farrell, Professor of Law, Cardozo Law School, Yeshiva University, NY. Consultant on: the process of designating representative payees for social security beneficiaries.

Howard N. Fenton, Professor of Law, Pettit College of Law, Ohio Northern University, Ada, OH. Consultant on: licensing procedures and judicial review under the Export Administration Act.

Eugene R. Fidell, Esquire, Member of the law firm of Feldesman, Tucker, Leifer, Fidell & Bank, Washington, DC. Consultant on: the availability of government ethics advisory opinions.

John Frye III, Administrative Judge, Nuclear Regulatory Commission, Washington, DC. Consultant on: study of non-ALJ adjudicators.

Margaret Gilhooley, Professor of Law, Seton Hall University School of Law, Newark, NJ. Since September 1989 at the Environmental Protection Agency. Consultant on: agency practices in indexing and making available their adjudicatory decisions (Recommendation 89-8).

Mark H. Grunewald, Professor of Law, Washington and Lee University School of Law, Lexington, VA. Consultant on: resolution of FOIA disputes (Statement 12 - 1987); consultant on the National Labor Relation Board's rulemaking to establish bargaining units in the health care industry.

John H. Jackson, Professor of Law, University of Michigan Law School, Ann Arbor, MI. Consultant on: procedures for antidumping and countervailing duty cases (with Professor Davey).

Timothy S. Jost, Professor, College of Law, Ohio State University, Columbus, OH. Consultant on: role of peer review organizations in the Medicare program (Recommendation 89-1).

Eleanor D. Kinney, Director, Program for Law, Medicine, and the Health Care Industry, Indiana University School of Law, Indianapolis, IN. Consultant on: Medicare appeals (Recommendation 86-5); national coverage determinations under Medicare (Recommendation 87-8); aspects of procedure and federalism in the Medicaid program.

Lisa G. Lerman, Professor of Law, Columbus School of Law, The Catholic University of America, Washington, DC. Consultant on: impediments to pro bono practice by government attorneys.

Michael Lewis, Esquire, Washington, DC. Consultant on: interagency agreement with the Environmental Protection Agency to provide EPA administrative law judges training in alternative dispute resolution techniques.

Paul Light, Associate Dean, Hubert H. Humphrey Institute, University of Minnesota, Minneapolis, MN. Consultant on: the role and operations of federal Offices of Inspector General.

Andreas F. Lowenfeld, Professor of Law, New York University School of Law, New York, NY. Consultant on: dispute resolution mechanisms under the U.S.-Canada Free Trade Trade Agreement.

William V. Luneburg, Professor of Law, University of Pittsburgh School of Law, Pittsburgh, PA. Consultant on: petitions for rulemaking (Recommendation 86-6); agency use of private attorneys (Recommendation 87-3); the federal employee grievance and personnel appeals process (Statement 15 - 1989).

Jonathan R. Macey, Professor of Law, Cornell University School of Law, Ithaca, NY. Consultant on: regulation of bank failures (with Professor Miller).

Michael P. Malloy, Professor of Law, Fordham University, New York, NY. Consultant on: adjudication practices and procedures of the federal banking agencies (Recommendation 87-12); administration of the Securities Exchange Act of 1934 by the bank regulatory agencies.

Wendy K. Mariner, Associate Professor of Health Law, Boston University School of Public Health and Medicine, Boston, MA. Consultant on: the national child vaccine injury compensation program.

David A. Martin, Professor of Law, University of Virginia School of Law, Charlottesville, VA. Consultant on: asylum adjudication procedures (Recommendation 89-4).

Thomas O. McGarity, Professor of Law, University of Texas School of Law, Austin, TX. Consultant on: multi-party forum shopping for appellate review of administrative action (Recommendation 80-5); agency procedures for performing regulatory analysis of rules (Recommendation 85-2); OSHA rulemaking (Recommendations 87-1 and 87-10); agency procedures for reviewing discretionary grant applications.

Errol Meldinger, Professor of Law, State University of New York at Buffalo School of Law, Buffalo, NY. Consultant on: citizen suits under federal environmental laws (Recommendation 85-3); division of roles in federal/state regulatory programs.

Geoffrey P. Miller, Professor of Law, University of Chicago School of Law, Chicago, IL. Consultant on: regulation of bank failures (with Professor Macey).

Marguerite S. Milthäuser, Esquire, Washington, DC. Consultant on: alternative dispute resolution roundtables for federal officials.

Benjamin Mintz, Professor, The Catholic University of America, Columbus School of Law, Washington, DC. Consultant on: updating Guide to Federal Agency Rulemaking.

Nancy J. Moore, Professor of Law, Rutgers University School of Law, Camden, NJ. Consultant on: the roles of government and private attorneys in representing federal employees who are investigated or charged with wrongdoing.

Thomas D. Morgan, Professor of Law, The National Law Center, George Washington University, Washington, DC. Consultant on: ratemaking delay (Recommendation 78-1); conflict of interest for government officials (Recommendation 79-7); revision of federal financial disclosure requirements (Recommendation 89-6).

Morrell E. Mullins, Professor of Law, University of Arkansas- Little Rock School of Law, Little Rock, AR. Consultant on: the Occupational Safety and Health Review Commission's procedures for simplified adjudication and use of settlement judges.

James A.R. Nafziger, Professor, Willamette University College of Law, Salem, OR. Consultant on: reviewability of consular officers' denials of visa applications (Recommendation 89-9).

David S. North, Project Director, TransCentury Development Associates, Washington, DC. Consultant on: a review of the alien legalization program (Statement 14 - 1989).

Gregory L. Ogden, Professor, Pepperdine University School of Law, Malibu, CA. Consultant on: siting of industrial development projects (Recommendation 84-1); agency standards of conduct for employees and the General Services Administration's ethics program.

James T. O'Reilly, Adjunct Professor, University of Cincinnati Law School, Cincinnati, OH. Consultant on: FOIA exemption for confidential business information (Recommendation 82-1); the Food and Drug Administration's procedures for approving AIDS drugs.

Henry H. Perritt, Jr., Professor of Law, Villanova University School of Law, Villanova, PA. Consultant on: experience with negotiated rulemaking (Recommendation 85-

5); federal agency use of computers in acquiring and releasing information (Recommendation 88-10); electronic technologies and federal archival practices.

Richard L. Revesz, Professor of Law, New York University School of Law, New York, NY. Consultant on: federal agency nonacquiescence in decisions of reviewing courts (with Professor Estreicher).

Leonard L. Riskin, Professor of Law, University of Missouri-Columbia School of Law, Columbia, MO. Consultant on: implementation of the Farmers Home Administration's mediation program.

Roy A. Schotland, Professor of Law, Georgetown University Law Center, Washington, DC. Consultant on: the audit and inspection practices of banking agencies.

Peter H. Schuck, Professor of Law, Yale Law School, New Haven, CT. Consultant on: formulation of policy through exceptions process (Statement 10 - 1983); judicial remands of cases to administrative agencies (with Professor Elliott).

Peter M. Shane, Professor of Law, University of Iowa College of Law, Iowa City, IA. Consultant on: congressional access to confidential agency information.

Sidney A. Shapiro, Professor of Law, University of Kansas School of Law, Lawrence, KS. Consultant on: hearing procedures for the resolution of scientific issues (Statement 11 - 1985); OSHA rulemaking (Recommendation 87-1); regulation by OSHA (Recommendation 87-10); federal regulation of biotechnology (Recommendation 89-7).

Thomas H. Stanton, Esquire, Member of the law firm of Olwine, Connelly, Chase, O'Donnell & Weyher, Washington, DC. Consultant on: oversight and regulation of government-sponsored enterprises.

Diane M. Stockton, Fairfax, VA. Consultant on: potential uses of ombudsmen in federal programs.

Arthur D. Wolf, Professor of Law, Western New England College School of Law, Springfield, MA. Consultant on: representative payee (Social Security) project.

Julia Wondolleck, Adjunct Professor, School of Natural Resources, University of Michigan, Ann Arbor, MI. Consultant on: the Fish and Wildlife Service's approach to conflict management under the Endangered Species Act (with Professor Yaffee).

Steven L. Yaffee, Professor, School of Natural Resources, University of Michigan, Ann Arbor, MI. Consultant on: the Fish and Wildlife Service's approach to conflict management under the Endangered Species Act (with Professor Wondolleck).



Executive Director William Olmstead, Confidential Assistant to the Chairman Renee Barnow, and Senior Special Assistant to the Chairman Neil Kritz conferring on procedures for the plenary reception.



William Schultz presenting his case for speedier approval for drugs at the July colloquy on FDA drug approval processes.

APPENDIX C - STAFF OF THE OFFICE OF THE CHAIRMAN

Chairman Marshall J. Breger

Senior Special Assistant to the Chairman Neil J. Kritz
Confidential Assistant to the Chairman Renee K. Barnow
Secretary to the Chairman Dorothea R. Collins*
 Kathryn Keil

Executive Director William J. Olmstead
General Counsel Gary J. Edles
Research Director Jeffrey S. Lubbers
Deputy Research Director Michael W. Bowers
Distinguished Visiting Fellow Wallace P. Warfield*
Supervisory Attorney Charles E. Pou, Jr.
Staff Attorneys Mary Candace Fowler
 Kevin L. Jessar
 Nancy G. Miller
 Brian C. Murphy
 David M. Pritzker
Director of Administration Daniel F. Mann
Administrative Officer Norma B. Smith
Librarian/Information Officer Jean R. Conrad
Library Technician Carole B. Brown*
Systems Administrator Gloria J. Coffey
Secretarial Staff Sharon. D. Anderson
 Gina K. Jackson*
 Susan M. Mack
 Eunice M. Sample
Receptionist Theresa Charlene Young
Legal Interns Gitti Frank*
 Stephen J. Jobe*
Clerk Typist Bertha C. Brown

* Resigned in 1989.



Scenes from the
December
plenary reception.

*Staff attorneys Kevin Jessar and Nancy Miller
enjoying themselves.*



*General Counsel Gary Edles conversing with Robert Kaufman,
member of the firm of Proskauer, Rose, Goetz & Mendelsohn.*



*Executive Director William Olmstead, White House Chief of Staff John
Sununu, and Chairman Marshall Breger receiving Mitchell Daniels, Jr.,
President of the Hudson Institute.*

APPENDIX D - ORGANIZATION AND OPERATION

The Administrative Conference of the United States identifies causes of inefficiency, delay, and unfairness in administrative proceedings affecting private rights and recommends improvements to the President, federal departments and agencies, the Congress, and the courts. Established as a permanent independent federal agency by the Administrative Conference Act of 1964 (5 U.S.C. §§571-576), the Conference was activated by the appointment of its first Chairman in January 1968. The bylaws and statute governing the organization and operation of the Conference appear in this report's Appendices G and H, respectively.

The Conference is a membership organization consisting of three related parts: the Office of the Chairman, the Council, and the Assembly.

THE OFFICE OF THE CHAIRMAN

The Chairman of the Administrative Conference is the chief executive of the Conference and its only compensated member. Appointed by the President, with the advice and consent of the Senate, the Chairman serves for a term of 5 years. Marshall J. Breger, the seventh Chairman of the Administrative Conference, was appointed by President Ronald Reagan on October 17, 1985.

The Chairman, with the approval of the Council, appoints the public members of the Conference. He presides at plenary sessions of the Assembly and at Council meetings, and is the official spokesman for the Conference in relations with the President, the Congress, the judiciary, the agencies, and the public. The Chairman has authority to investigate matters brought to his attention by individuals inside and outside government, and to designate subjects for Conference recommendations. The Chairman is served by a small permanent career staff, which furnishes administrative and research support to the Assembly and committees of the Conference, provides guidance and assistance to research consultants, and helps the Chairman in securing implementation of recommendations and in providing advice and assistance to agencies and to committees of the Congress.

THE COUNCIL

The Council consists of the Chairman and 10 other members, who are appointed by the President for 3-year terms, not more than one-half of whom may be employees of federal agencies. The Council performs functions similar to those of a corporate board of directors. It calls plenary sessions of the Conference and fixes their agendas, authorizes subjects for study, receives and considers reports and recommendations before they are considered by the Assembly, and exercises general budgetary and policy supervision.

In 1989 Council members Daniel Oliver, Mark Sullivan III and Curtis H. Barnette resigned. The Vice Chairmanship has been vacant since 1988, when former Vice Chairman James Miller's term as Council member ended. On December 14, 1989, President Bush appointed three new members to the Council: Richard C. Breeden, Chairman, Securities and Exchange Commission; Constance Berry Newman, Director, Office of Personnel Management; and Harold R. DeMoss, Jr., an attorney at Bracewell & Patterson in Houston, Texas. Thus, there were a total of nine Council members, in addition to the Chairman, at the end of 1989.

THE ASSEMBLY

Structure of the Assembly

The members of the Conference, when meeting in plenary session, constitute the Assembly of the Conference. The number of members, by statute, may not be fewer than 75 nor more than 101. At the end of 1989, the Conference had 94 members. In addition to the Council, members fall into four groups: (i) those agency representatives designated by statute; (ii) those agency representatives designated by the President; (iii) additional agency representatives designated by the Council; and (iv) those public members appointed by the Chairman with the approval of the Council. In addition, a number of individuals serve in a nonvoting status as liaison representatives, senior fellows, or special counsels.

Statutory Members

The Administrative Conference Act confers membership upon the chairman of each independent regulatory board or commission or a person designated by the agency (5 U.S.C. §573(b)(2)). The boards and commissions having statutory members include:

Commodity Futures Trading Commission
Consumer Product Safety Commission
Federal Communications Commission
Federal Election Commission
Federal Energy Regulatory Commission
Federal Home Loan Bank Board¹
Federal Maritime Commission
Federal Reserve System
Federal Trade Commission
Interstate Commerce Commission
National Labor Relations Board
Nuclear Regulatory Commission
Securities and Exchange Commission

Agencies Designated by the President or the Council

The Administrative Conference Act grants membership to the head (or the designee of the head) of each executive department or other administrative agency designated for this purpose by the President (5 U.S.C. §573(b)(3)). Under this authority, the President has designated 14 Cabinet departments and several additional executive agencies for membership, and the Council has acted to provide 5 additional memberships from 4 of these departments having subcomponents with special regulatory responsibilities. In addition, in 1989 rotating memberships were held by the Department of Housing and Urban Development for an administrative law judge and by the Department of the Interior for an inspector general. In 1988 the Council authorized a rotating membership position for a member of a board of contract appeals. The President has also designated 13 other administrative agencies for membership. Two of these 35 positions were vacant at the end of 1989.

Cabinet departments include:

Department of Agriculture
Department of Commerce
Department of Defense (includes member of Board of Contract Appeals)
Department of Education
Department of Energy
Department of Health and Human Services
(includes Food and Drug Administration
and Social Security Administration)

1. In 1989 the Federal Home Loan Bank Board was dissolved; this position no longer exists.

Department of Housing and Urban Development
(includes administrative law judge)
Department of the Interior (includes inspector general)
Department of Justice
Department of Labor (includes Occupational
Safety and Health Administration)
Department of State
Department of Transportation (includes Federal
Aviation Administration)
Department of the Treasury
(includes Internal Revenue Service)
Department of Veterans Affairs¹

Administrative agencies include:

Commission on Civil Rights
Environmental Protection Agency
Equal Employment Opportunity Commission
Federal Deposit Insurance Corporation
General Services Administration
Merit Systems Protection Board²
National Aeronautics and Space Administration
Occupational Safety and Health Review Commission
Office of Management and Budget³
Office of Personnel Management
Small Business Administration³
U.S. International Trade Commission²
U.S. Postal Service

Public Members

This group consists of members appointed for 2-year terms by the Chairman, with the approval of the Council. These "nongovernment" members, who are required by the Administrative Conference Act to comprise not less than one-third nor more than two-fifths of the total membership, are selected to provide broad representation of the views of private citizens of diverse experience. They are chosen from among members of the practicing bar, scholars in the field of administrative law or government, and others specially informed with respect to federal administrative procedure. They are reimbursed for travel expenses but otherwise serve without compensation.

1. Replaces position held by the former Veterans Administration, which was upgraded to Cabinet status in March 1989.

2. Formerly liaison representative status.

3. Position vacant at end of 1989.

At the close of 1989 the public members numbered 37. Public members are limited to no more than four terms of continuous service (1 CFR §302.2(b)).

In 1986, the bylaws of the Conference were amended to require that the terms of one-half of the public members expire in each calendar year, replacing the prior requirement that all terms expire in even-numbered years.

Senior Fellows

Under section 2(e) of the bylaws (1 CFR §302.2(e)), former chairmen of the Conference and individuals who have served for 8 or more years as members are eligible for 2-year appointments as senior fellows. Senior fellows are assigned to committees and participate in other Conference functions as members, but may not vote at plenary sessions.

Liaison Representatives

The Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the judiciary, federal agencies not otherwise represented in the Conference, and professional associations (1 CFR §302.4). Individuals who serve in such a capacity participate in the activities of the Conference, having privileges of the floor at committee meetings and plenary sessions, but have no vote at plenary sessions. At the close of 1989 liaison representatives numbered 23. Organizations with liaison representation are:

Judiciary

- Administrative Office of the U.S. Courts
- Federal Judicial Center
- Judicial Conference of the U.S.
- U.S. Claims Court
- U.S. Court of Appeals for the Federal Circuit
- U.S. Court of International Trade
- U.S. Court of Military Appeals

Federal Agencies

- ACTION¹
- Advisory Commission on Intergovernmental Relations
- Council on Environmental Quality
- Executive Office for Immigration Review
- Executive Office of the President¹

1. Ceased to be liaison agency in 1989.

Farm Credit Administration¹
Federal Bar Association¹
Federal Labor Relations Authority
Federal Mediation and Conciliation Service
Federal Mine Safety and Health Review Commission
General Accounting Office
Office of the Federal Register
Pension Benefit Guaranty Corporation²
Postal Rate Commission
Selective Service System

Professional Associations

ABA Administrative Law Section
ABA National Conference of Administrative Law Judges
Federal Administrative Law Judges Conference

Special Counsels

Under section 2 (f) of the bylaws, from time to time the Chairman designates individuals to the position of Special Counsel to the Administrative Conference. These persons, who do not serve under any of the other official membership designations, advise and assist the membership in areas of their special expertise. They are assigned to committees and participate in Conference functions but may not vote at plenary sessions. Nine Special Counsel appointments were in effect at any one time for portions of 1989. (See Appendix A, page 43 for list of Special Counsels.)

Operation of the Assembly

The Assembly, which has ultimate authority over all activities of the Conference, operates much like a legislative body. Through the adoption of bylaws, the Assembly has established six standing committees to work on individual Conference projects. In addition, occasionally it establishes "special" committees to concentrate on certain timely issues, and two such committees were created in 1987: the Special Committee on Financial Affairs and the Special Committee on Ethics in Government. The committees are the most important component of the process that leads to the adoption of Conference recommendations, since it is at the committee level that consultants' reports are first analyzed and proposed recommendations are formulated.

1. Became a liaison organization in 1989.

2. Ceased to be liaison agency in 1989.

THE COMMITTEES

Committees meet periodically to plan and guide research by academic and professional consultants and by the Chairman's professional staff. On the basis of this research, along with public and agency input through written comments, meetings, and, where appropriate, public hearings, the committees frame proposed recommendations for consideration by the Assembly. When a study and tentative recommendation have been prepared, these are circulated to the affected agencies and announced to the public for comment, then reexamined by the committee in light of the replies.

After final committee approval, a proposed recommendation is transmitted to the Council and then to the Assembly for consideration in plenary session. The Assembly may either adopt the recommendation in the form proposed by the committee, amend the recommendation, refer it to committee, table it, or reject it entirely.

Since January 1968, the Assembly of the Conference has adopted 150 recommendations. Ten recommendations were adopted during 1989. Occasionally, the Assembly acts to state its views on a particular matter without making a formal recommendation on the subject. Fifteen of these "statements" have been adopted by the Conference since 1968. Two statements were adopted in 1989. The recommendations and statements of the Conference adopted during 1989 are reproduced in full in Appendix E of this report.

The official actions of the Conference, along with related research reports, are published in the annual series *ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS*. Recommendations and statements (but not reports) are also published in the *FEDERAL REGISTER*, and those of continuing interest in the *CODE OF FEDERAL REGULATIONS*, Title 1, Parts 305 and 310.

Committee Activities

The COMMITTEE ON ADJUDICATION, chaired by Richard J. Leighton, completed two projects relating to immigration procedures and one relating to the Medicare program.

The committee sent forward one proposed recommendation and one proposed statement on immigration topics. The statement, based on a study by David North and Anna Mary Portz, addressed the alien legalization program as an example of a mass decisionmaking program, and made generalized suggestions for administering such programs. It also made some suggestions to the INS with respect to its operation of the second phase of the legalization program. A study by Professor James

A.R. Nafziger of Willamette University formed the basis for Recommendation 89-9, concerning the processing and reviewability of visa denials by consular officials. It makes a number of suggestions to the State Department for ways to improve the consistency and fairness of the visa review process.

The committee also completed work on the Medicare peer review project undertaken by Professor Timothy Jost, which had been put over from December 1988. The Conference approved the recommendation as Recommendation 89-1.

The committee's agenda for 1990 will include studies on the Social Security disability appeals process and the FAA administrative civil penalty program.

The COMMITTEE ON ADMINISTRATION, chaired by Darrel J. Grinstead, completed research on two projects leading to Conference action in 1989. One study, done *pro bono* by Richard J. Bednar of the Washington law firm of Crowell and Moring, examined potential ways for government contracting officers to make greater use of alternative means of dispute resolution to resolve disputes with contractors short of litigation. The resulting Conference Recommendation 89-2, "Contracting Officers' Management of Disputes," called for training to be incorporated into these officers' regular orientation programs and advocated several other steps to increase use of ADR by contracting officers.

A second study before the Committee, by Professor Frank Bloch of Vanderbilt Law School, examined uses for medically-trained personnel in deciding disability claims before five federal agencies. The Committee's consideration of this report led it to develop Recommendation 89-10, "Improved Use of Medical Personnel in Social Security Disability Determinations."

Committee research plans for 1990 include studies of current and potential roles for ombudsman processes within federal agencies, participation by the Federal Aviation Administration in international standard-setting activities, processes for handling disputes under the Endangered Species Act, and an evaluation of the Farmers Home Administration's new mediation program for farmer-lender disputes.

The SPECIAL COMMITTEE ON ETHICS IN GOVERNMENT, chaired by Fred F. Fielding, continued in 1989 to study and recommend improvements in the federal government's system of regulating employee conflicts of interest. The Committee recommended that Congress create special conflict-of-interest rules for members of federal advisory committees that recognize both the special status of such people and the need for disclosure (to the agency and sometimes the public) of information about their financial interests. The Committee's recommendation was

based on a report by Richard K. Berg, former Conference general counsel.

In a second recommendation, the Committee proposed changes in the Ethics in Government Act's executive branch public financial disclosure requirements that were designed to eliminate unnecessary detail in the reporting of assets, liabilities, and gifts. The recommendation was based on a report by Professor Thomas D. Morgan (Emory University School of Law, now at George Washington University).

Ongoing committee projects include a study of the role of government and private attorneys in representing federal employees charged with wrongdoing, including issues such as when it is necessary for an employee to obtain private counsel, problems related to changing from government counsel to private counsel, limits on private attorney representation in agency investigations, and payment of attorney fees. Another study underway will examine the history and purposes of section 205 of Title 18, United States Code, which forbids federal attorneys to represent private persons in proceedings in which the federal government has an interest.

The SPECIAL COMMITTEE ON FINANCIAL SERVICES, chaired by Kenneth Bialkin, met three times during 1989 to consider the draft recommendation and accompanying report on Agency Administration of Failed or Failing Depository Institutions. The recommendation is expected to be ready for consideration by the Assembly during 1990. The Special Committee also devoted considerable attention to procedural issues arising under the legislation which led to enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA, Pub. L. 101-73, 103 Stat. 183). For example, consultant Lawrence G. Baxter prepared a detailed analysis comparing the administrative procedural provisions of the House and Senate bills introduced prior to the enactment of FIRREA. Several recommendations already approved by the Special Committee and adopted by the Assembly (portions of Recommendations 87-12 and 88-8) were adopted in FIRREA. These included the development of procedures for the administrative adjudication of claims against savings institution receiverships, the pooling of administrative law judges by the federal bank regulatory agencies, and the use of alternative means of dispute resolution by the Federal Deposit Insurance Corporation.

In 1989, the COMMITTEE ON GOVERNMENTAL PROCESSES, chaired by Harris Weinstein, examined the procedures for resolving federal personnel disputes. Congress' comprehensive revision of the civil service laws in 1978 created an elaborate new framework for handling employee complaints, grievances and appeals. A study of how these

procedures have been working, by Professor William V. Luneburg of the University of Pittsburgh School of Law, served as the basis for the committee's discussions.

The committee concluded that the complexity of the system is due in large part to the tension inherent in congressional efforts to achieve simultaneously adequate protection from discrimination, uniformity of personnel management, and more effective use of arbitration to resolve federal employee grievances. Because Congress made a conscious choice based on substantive policy and value judgments transcending the domain of administrative procedure, the committee took the position that a decision whether to modify the present procedures must be resolved largely through the legislative process.

At the December plenary session, the Conference adopted a Statement on Procedures for Resolving Federal Personnel Decisions, which sets forth these conclusions. The Conference believes that after the first decade of experience under the 1978 Civil Service Reform Act, the time is ripe for fresh consideration by Congress of the problems that gave rise to the Act and the actual experience under the Act. The Statement identifies a number of issues that should be addressed as part of a comprehensive congressional review of the federal personnel complaint process.

The COMMITTEE ON JUDICIAL REVIEW acquired a new chairman, Peter Strauss, midway through 1989 when former chairman Thomas Susman became a Senior Conference Fellow. The committee completed work on one project in 1989--a study of judicial deference to agency statutory interpretations expressed in various formats, undertaken by Professor Robert Anthony of George Mason University School of Law. In ACUS Recommendation 89-5, based on this study, the Conference observed that statutory interpretations made in informal formats (e.g., press releases, informal advice, speeches, internal memoranda) are not ordinarily entitled to judicial acceptance as definitive interpretations; the recommendation urges agencies that intend to produce definitive statutory interpretations to use rulemaking, formal adjudication, or other procedures authorized by Congress for the development of such definitive interpretations.

The committee considered two other projects in 1989, work on which should be completed in 1990. Professors Peter Schuck and E. Donald Elliott of Yale Law School (now General Counsel, Environmental Protection Agency) completed an empirical study of the impact of judicial review on federal agency action. The committee and consultants concluded that the study, while not pointing to specific recommendations for Conference consideration, is of great value in demonstrating the usefulness of an empirical approach to administrative law questions. The committee expects to transmit this report to the Conference in 1990,

accompanied by a statement describing the merits of the report and its methodology. The Committee on Judicial Review also met with Professor Harold Bruff of the University of Texas School of Law to discuss his draft report on approaches to restructuring judicial review in administrative law; the committee will be considering a revised version of this report in 1990.

The COMMITTEE ON REGULATION also acquired a new chairman, John Golden, in August 1989 when former chairman Betty Jo Christian became a Senior Conference Fellow. The committee considered two subjects of current importance in 1989. The committee's examination of the experience of federal agencies in attempting to regulate the rapidly developing field of biotechnology led to adoption of Recommendation 89-7, Federal Regulation of Biotechnology, in December 1989. The recommendation is based on a study by Professor Sidney A. Shapiro of the University of Kansas School of Law.

The committee also began consideration of how disclosure of information about various risks can be used as an alternative or a supplement to federal regulation in areas affecting health, safety, or the environment. The Conference's consultant on this topic is Professor Michael Baram of the Boston University School of Law.

The COMMITTEE ON RULEMAKING, chaired by Ernest Gellhorn, approved two recommendations in 1989. The first, Recommendation 89-4, "Reforming Asylum Adjudication," was based on a study by Professor David Martin of the University of Virginia. It advocated fundamental reorganization and reform of the asylum adjudication process. The second, Recommendation 89-8, "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," was based upon a study by Professor Margaret Gilhooley of Seton Hall University. (Since September 1989 Professor Gilhooley has been employed by the Environmental Protection Agency.) This recommendation advocates review and improvement of agency indexing practices.

Recommendation 89-4 endorses a reorganization of the administrative process for adjudicating asylum applications to satisfy the dual aims of preserving the humanitarian tradition of granting refuge to the persecuted and of effectively responding to the dramatic increase in the number of applications for asylum. The Recommendation endorses the creation of a new Asylum Board, located within the Executive Office of Immigration Review in the Department of Justice, consisting of an adjudication division, an appellate division, and a documentation center.

Recommendation 89-8 urges that agencies that do not already do so should compile a subject-matter index of their adjudicatory decisions. This index could afford citizens information useful in dealing with

the agencies and assist the development of agency standards and policies on general issues and recurring questions. Indexes should be either universal, including all final decisions, or selective. A selective index should include all significant decisions, whether or not they are considered precedential. The agency index, which should be fully disclosed and readily available to the public, should cover the adjudicatory decisions of the agency's highest level tribunal. The agency should also consider whether to index significant lower level decisions that have become final.



Richard Bednar, consultant on government contracting officers' use of alternative dispute resolution.

APPENDIX E - RECOMMENDATIONS AND STATEMENTS

Recommendation 89-1:

Peer Review and Sanctions in the Medicare Program

(Adopted June 15, 1989)

As the Administrative Conference noted in Recommendation 86-5,¹ the Medicare program relies heavily on implementation of federal requirements by localized carriers, intermediaries and, increasingly, peer review organizations (PROs).

The PRO system was created in 1982. It is made up of state-wide, physician-controlled organizations under individual contracts with the Department of Health and Human Services (HHS). These contracts are negotiated pursuant to a general contractual "Scope-of-Work" promulgated by HHS every three years. PROs are delegated a number of important responsibilities under the Medicare system. They identify substandard, unnecessary or inappropriate services rendered to Medicare beneficiaries, and oversee education and corrective actions for substandard providers (e.g., hospitals) and medical practitioners. They also recommend to HHS that it sanction providers and practitioners when they find seriously improper practices, deny Medicare payment for inappropriate or unnecessary services, and protect the rights of beneficiaries.

This recommendation follows the suggestion made in Recommendation 86-5 that the PRO program was deserving of further study. It recognizes the evolutionary nature of the PRO's role in Medicare, and the administrative difficulties posed for HHS in overseeing this decentralized program--especially since new legislative directions affecting the program appear regularly, often contained in year-end omnibus budget reconciliation acts. Nevertheless, the Conference urges the Department (and, where necessary, Congress) to make changes designed to improve the accessibility of PRO-related policies, the fairness and firmness of PRO sanctions imposed on providers and practitioners, and the effectiveness of PRO safeguards for beneficiary rights.

In Paragraph A of the Recommendation, the Conference urges several enhancements of HHS' current practices in disseminating, making

accessible, and soliciting comments on, PRO program guidelines of general applicability, including the scopes of work, manuals, and the criteria and norms used to evaluate medical care. Paragraph B seeks to promote improvements in the PRO's assigned duty of investigating complaints by beneficiaries, and urges Congress to allow PROs to act in response to oral complaints.

Paragraph C recommends invigorating the process of investigating and adjudicating sanctions against health care practitioners and providers charged with violations of their obligations under the Medicare program. The current sanction process begins when a PRO gives formal notice to the practitioner or provider involved that it considers that poor quality care may have been rendered or that other violations have occurred. The PRO is required to have at least one quite formalized meeting with the practitioner or provider to discuss the allegations that the care rendered either "failed in a substantial number of cases substantially to comply" with the statutory obligation to render proper medical care, or "grossly and flagrantly violated such obligations in one or more instances." 42 U.S.C. §1320c-5(b). (In the former type of case, at least two meetings are required.) If, after the meeting, the PRO believes that violations have occurred, it recommends to the HHS Office of Inspector General (OIG) that a sanction be imposed, either in the form of an exclusion from participation in the Medicare program for some period of time, or a civil monetary penalty of no more than the amount of the cost of medically improper or unnecessary services. If the OIG agrees that violations have occurred, and in addition finds that the practitioner or provider is unwilling or unable to comply with the obligations to render proper care, the OIG may impose one of these sanctions. If the sanction is exclusion, it becomes effective fifteen days after notice.² The sanction is appealable to an ALJ, then to the Appeals Council; judicial review is subsequently available.

This recommendation seeks to balance the vital interest in protecting the health and safety of program beneficiaries and the need to assure fairness to the accused provider or practitioner whose livelihood is at stake and whose services might be needed. The Conference urges that the current PRO sanction process be streamlined. It also urges that all providers and practitioners, not just some, be permitted to seek a stay of an HHS order to exclude them from the Medicare program, in a proceeding akin to that of a temporary restraining order at the administrative law judge adjudication stage of that process. However, the burden would be on the practitioner or provider to show that no serious risk would be posed to beneficiaries during the pendency of the administrative appeal. The Conference also urges legislative changes that, while maintaining the requirement that the OIG prove that violations have occurred, would eliminate the additional requirement of proving that the practitioner or provider is unwilling or unable to comply with the obligations to provide quality care. The offenses or oversights, which have

been found both by peers (PROs) and regulators (OIG) to be substantial or gross and flagrant, already serve as indicators of inability or unwillingness to comply. Under the current law, before excluding a provider or practitioner on the basis of these findings, the government must bear an additional evidentiary burden that is inappropriate for this type of proceeding. It must prove what amounts to a speculative negative -- that violators would be unwilling or unable to comply with the law in the future. The apparent result of this evidentiary requirement has been to chill the initiation of exclusion proceedings against providers and practitioners who are providing improper care or otherwise violating the law. Further, the Conference recommends legislative changes to provide for meaningful civil money penalties, as well as for the current sanction of excluding providers and practitioners from the program. It should be noted that the Conference views the changes in the sanction procedure contained in this paragraph as a unified package, one that in its present form balances conflicting interests but that will become unbalanced if any one significant portion were not to be accepted.

Paragraph D urges changes in the PRO statute and regulations to ensure that beneficiaries are better informed of their rights to appeal decisions concerning their lack of coverage or discharge from a hospital or other facility, and that they will not be discharged until such appeals are resolved. Paragraph E covers the PRO's role in denials of payment for care determined to be unnecessary, substandard or rendered in an inappropriate setting. It recommends that HHS implement in final rules 1985 legislation concerning PRO denials for substandard care.³ It also urges HHS to amend its rules to require that PROs not make any final decisions affecting payment without adequate review by medical practitioners who are qualified in the relevant area. Finally, Paragraph F urges HHS to take steps to permit PROs to share information with provider facilities and state medical boards.

RECOMMENDATION

A. Publication and Dissemination of PRO Program Guidelines

1. HHS should enhance its current practice of publishing and disseminating all Peer Review Organization (PRO) program rules having a substantial effect on providers, medical practitioners and beneficiaries by taking the following steps:

(a) Notice-and-comment procedures should be used for rulemaking except when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.⁴

(b) Proposed PRO "scopes of work" and any generally applicable modifications or interpretations of the responsibilities of PROs during a contract

cycle should be published in the Federal Register and disseminated to relevant interest groups. Interested parties should be allowed 30-45 days for commenting, unless explicit Congressional deadlines would be contravened thereby, or unless there is good cause for immediate implementation.

(c) HHS should make PRO contracts, manual instructions, and other guidelines of general applicability regarding the PRO program readily available to the public at convenient locations, including social security offices. HHS should publish an updated list of such materials in the Federal Register at least quarterly.

2. HHS should encourage PROs to use outreach and consensus-building techniques analogous to negotiated rulemaking when they are developing criteria and norms for PRO review of the quality, necessity and appropriateness of medical care.⁵ HHS should further encourage PROs to make these criteria and norms consistent nationwide.

B. PRO Investigations of Beneficiary Complaints

1. Congress and HHS should coordinate the system of PRO review of beneficiary complaints concerning quality of services with other federal and state regulatory schemes. Initially, priority consideration should be given to complaint investigations in the hospital setting, where PROs have the most expertise and where alternative means to investigate complaints are least available.

2. Congress should amend 42 U.S.C. §1320c-3(a)(14) to permit PROs to investigate and otherwise act on oral complaints concerning the quality of services. Until it does so, HHS should require PROs to receive such oral complaints from beneficiaries or witnesses, and reduce them to writing, before acting on them.

3. HHS should require PROs to use investigative techniques that, so far as may be feasible, protect from disclosure the identity of complainants who do not expressly and voluntarily consent to such disclosure. Where the identity of a complainant who desires anonymity cannot be kept confidential, the PRO should give the complainant the option of withdrawing the complaint in lieu of disclosure, although the PRO may at its discretion continue to investigate the underlying problem.

4. HHS should amend the PRO Scope of Work to conform to the 1986 Omnibus Budget Reconciliation Act by requiring PROs to inform beneficiaries fully regarding the final disposition of all complaints, whether involving providers or practitioners. PROs also should be required promptly to inform providers and practitioners of the final disposition of investigations involving them.

5. HHS should establish guidelines and a significantly more expedited schedule than the current several-month process for PROs to

complete initial investigations of complaints of potentially life-threatening quality deficiencies. HHS also should establish procedures for receiving and acting on requests for intervention in cases where PROs do not process complaints on a timely basis.

C. Sanctions Against Providers or Practitioners Who Have Provided Improper or Unnecessary Services

Congress should streamline the sanction process by taking the following interrelated steps to promote heightened enforcement, while preserving fairness to the accused provider or practitioner:

1. HHS should seek to ensure greater uniformity among PROs through training and the development of a model sanction referral form. To preserve needed healthcare resources, HHS and the PROs should continue to emphasize education and corrective action rather than sanctions as the primary means of addressing quality problems. HHS should also amend its rules (a) to require that, once a PRO determines that there is a quality problem for which a sanction is the appropriate intervention, it immediately start the sanction process, and (b) to provide that, ordinarily, there will be only one formal meeting between the PRO and the accused provider or practitioner after the sanction proceeding has been initiated.

2. Congress should amend the PRO statute to offer all providers and practitioners (urban and rural), upon their receipt of an HHS notice of exclusion pursuant to 42 U.S.C. §1320c-5(b), the opportunity for a preliminary hearing and decision. Such a proceeding would be conducted by an ALJ on the issue of whether the provider or practitioner would pose a serious risk to patients during the pendency of the subsequent ALJ proceeding on the merits of the exclusion. The preliminary hearing would be in the nature of a temporary restraining order proceeding, and would arise and be conducted according to the following procedures:

- (a) If, within 10 days of receipt of notice of the exclusion, the provider or practitioner appeals the decision of the HHS Office of Inspector General (OIG) imposing an exclusion, a preliminary hearing on the "serious risk" issue should take place before the exclusion takes effect.

- (b) If the provider or practitioner establishes at the preliminary hearing that continued participation in the Medicare program pending the ALJ's decision on the underlying appeal will not pose a serious risk to patients, or that such participation can be restricted to preclude such risk, the HHS exclusion order shall be stayed or modified by the ALJ until the ALJ issues a final decision on the merits of the exclusion.

(c) The ALJ must render the preliminary decision on the "serious risk" issue as quickly as possible but within no more than 30 days after the filing of the appeal, and a final decision on the exclusion within a time period reflecting assignment of the highest priority to the adjudication.

3. Congress should retain the requirement in 42 U.S.C. §1320c-5(b)(1) that sanctions be based on determinations that a practitioner or provider has either (A) "failed in a substantial number of cases substantially to comply" with statutory obligations to render appropriate and quality care, or (B) "grossly and flagrantly violated such obligations in one or more instances." However, Congress should eliminate the separate and additional requirement in 42 U.S.C. §1320c-5(b)(1) that the OIG must determine the provider's or practitioner's "unwillingness or lack of ability substantially to comply" with program obligations before imposing sanctions on the provider or practitioner.

4. Currently the PRO statute [42 U.S.C. §1320c-5(b)(3)] limits monetary penalties to "the actual or estimated cost of . . . medically improper or unnecessary services." In order to provide for a wider range of sanctions, Congress should amend the PRO statute to allow the OIG to assess a substantial civil money penalty for each violation against providers and practitioners who are found to have grossly and flagrantly violated their obligations on one or more occasions, or to have substantially violated such obligations in a substantial number of cases. The OIG should be given the discretion to impose such monetary penalties in addition to an exclusion where appropriate.

5. HHS should assign PRO sanction cases to ALJs attached to the Departmental Appeals Board (who currently hear other sanction cases in the Department) rather than to Social Security ALJs, as is the current practice.

D. Notice to Beneficiaries of Noncoverage

1. Congress should amend 42 U.S.C. §1320c-3(e)(3) to assure that hospitalized beneficiaries who appeal the hospital's notice of non-coverage by noon of the day following receipt of the notice, should not have such coverage discontinued until the PRO rules on their request for review.

2. HHS should amend the PRO regulations to assure that, at the time a hospital informs beneficiaries of its decision to discharge them or of the discontinuance of coverage, they are informed of their discharge appeal rights under the PRO program.

3. The notice of a right to appeal should be on a form drafted by HHS (developed in consultation with beneficiary organizations and other interested parties), and should include a concise and easily understood statement of the basic beneficiary right to a no-liability appeal to the PRO. If the current system of separate appeal tracks (depending on whether

the hospital and attending physician concur or not) is retained, separate notices should be given for each track to avoid the confusion caused by a notice that describes multiple procedures.

E. PRO Denials of Payment for Substandard or Unnecessary Care

1. HHS should proceed expeditiously to final rulemaking to implement PRO authority, contained in 42 U.S.C. §1320c-3(a)(2), to deny payment to practitioners or providers for care that does not meet professionally recognized standards.

2. HHS should require by regulation that PROs not make final utilization review denials (denials of payment for care that has been determined to be unnecessary or rendered in an inappropriate setting) until a proposed denial and the response to it by the affected provider or practitioner have been reviewed by at least one practitioner qualified by professional training and experience relevant to the matters in controversy. Although HHS should at a minimum apply the same standard to reviews of denials of payment for failure to meet professional standards of care, it may be appropriate in this context to require that the review be performed by a physician practicing in the same care specialty.

F. PRO Sharing of Information

1. HHS should issue PRO manual instructions and amend the Scope of Work in order to implement the Congressional mandate requiring the sharing of information among the PROs and state medical boards and licensing authorities regarding practitioners and providers who violate quality standards, and should modify its current confidentiality and disclosure regulations to require that a copy of any PRO final sanction recommendation be provided to such bodies. HHS should explore the feasibility of including sanction recommendations in the National Practitioner Data Bank.

2. HHS should amend PRO regulations to require PROs to share with hospitals information about confirmed violations of quality of care standards involving doctors on the staffs of such hospitals, including the contents of corrective action plans.

1. ACUS Recommendation 86-5, *Medicare Appeals*, CFR §305.86-5.

2. Certain practitioners in rural areas are permitted to have the exclusion stayed, pending OIG proof that the practitioner would pose a "serious risk" to program beneficiaries if allowed to remain in the program during the pendency of the administrative appeal.

3. On January 18, 1989, HHS published a proposed rule covering this subject. 54 Fed. Reg. 1956.

4. See ACUS Recommendation 83-2, *The "Good Cause" Exemption from APA Rule-making Requirements*, 1 CFR §305.83-2.

5. See ACUS Recommendations 82-4, 85-5, *Procedures for Negotiating Proposed Regulations*, 1 CFR §305.82-4, 85-5.

Recommendation 89-2

Contracting Officers' Management of Disputes

(Adopted June 15, 1989)

An increasing number of problems in the management of government contracts are now referred to lawyers, accountants, and judges for resolution. This accelerating trend has tended to deemphasize the responsibility of the agency contracting officers, who (in most agencies) have traditionally played a key role in the procurement process, including dispute handling.¹ Many contracting officers ("COs") today are subject to restrictive regulations and close oversight that can inhibit their willingness to negotiate settlements. For this and other reasons, many cases proceed to needless litigation that are in fact susceptible to prompt, direct resolution by COs at an early stage when parties are often less entrenched and more cognizant of program interests.²

Several Conference studies have demonstrated opportunities for improving agencies' resolution of contract disputes consonant with the Contract Disputes Act's³ goal of expeditious resolution without disrupting performance.⁴ While a few agencies have experimented with alternative means of dispute resolution at the appeal level, these methods are even more likely to be useful prior to issuance of a contracting officer decision. This potential has been neglected. Current training for COs does not address ADR and gives minimal attention to negotiation skills. These methods⁵ serve the agency by helping to expedite dispute handling. They serve the parties by keeping outcomes in the control of the contracting parties, preserving cooperative business relations, avoiding litigation (and the concomitant loss of control as to results), and--most important--allowing the parties to return to concentrating on productive work rather than conflict.

This recommendation builds on an earlier one (87-11), in which the Conference focused primarily on possible uses for consensual means of resolving contract disputes at the appeal level. It identified the decreased authority of COs as a major factor contributing to the inefficiency and cost of resolving many conflicts. Recommendation 87-11 (in pertinent part) calls for (1) legislation, an executive order, by the Office of Federal Procurement Policy, policy statement, and Federal Acquisition Regulation changes to encourage COs, before issuing a decision likely to be unacceptable to a claimant, to explore use of ADR to resolve their differences; (2) agency adoption of policies encouraging ADR and regular use of rules or notices to alert COs and other parties to ADR availability; (3) agency designation of an employee to serve as an ADR specialist in connection with contract disputes; and (4) agency attention to the need to offer training in negotiation and other ADR skills to COs and others involved in contract disputes.

The instant recommendation seeks to go further to enhance the CO's ability and authority in the resolution of contract disputes. Calling for CO training in negotiation and dispute handling, as well as increased use of ADR techniques as part of a CO's decisionmaking process, it supplements the prior recommendation by focusing on the integration of consensual dispute resolution into already existing dispute and training systems at the CO level, overcoming obstacles to ADR use, and practical guidance in improving CO-level dispute resolution.

RECOMMENDATIONS

1. Agencies with significant acquisition activity, acting in consultation with expert groups, should encourage COs, and other key personnel involved in the resolution of contract disputes, to make greater efforts routinely to consider and utilize ADR to help resolve claims. Since dispute resolution at the CO level is very much a shared activity, these persons may include program and project managers, attorneys, auditors, engineers, specialists in pricing, packaging, production, maintenance and quality control, and other technical experts or contracting officials. These agencies should undertake comprehensive programs of promoting ADR at the CO level. The programs should include application of ADR techniques in specific test cases, conduct of training, case screening, and information and guidance for personnel and contractors.

2. Agency heads should direct senior officials within the acquisition hierarchy to act as proponents for dispute resolution, with the specific mission of developing more effective contract dispute resolution practices. Agencies with extensive acquisition activity should designate a senior official within the acquisition hierarchy with the specific mission of developing more effective contract disputes resolution practices. This official's mission would include challenging barriers to wider ADR use, educating disputants in industry and government, and improving understanding and use of ADR procedures at the CO level.

3. The Federal Acquisition Regulation should be amended to describe specifically the full range of dispute resolution methods available for consideration by the parties at or before the time a claim is presented to the CO for resolution under the Contract Disputes Act.

4. COs involved in the disputes process should be specifically evaluated, as part of the annual performance evaluation cycle, on their effectiveness in managing contract disputes.

5. In addition to those techniques set forth in Recommendation 87-11, agencies should be encouraged to use the following specific methods in CO-level disputes:

(a) Employing factfinding to offer an advisory decision, or designating a CO who was not involved in the disputed issues, or a particular distinguished government official or other knowledgeable person, to make an advisory decision;

(b) Employing minitrial or other processes to permit a structured presentation of facts and arguments to the CO or other government officer with authority to settle;

(c) Agreeing in advance that disputes arising under a particular contract will be voluntarily submitted to an expert or panel for a nonbinding opinion as soon as a disagreement occurs; and

(d) Encouraging agency COs to employ the services of mediators or other neutrals to enhance negotiations to settle contract disputes.

6. Board of Contract Appeals judges should take greater advantage of opportunities to suggest returning to the CO cases which evidently should be pursued more vigorously for settlement.

7. ADR training programs, for both industry and government personnel, should be integrated into existing management training programs, as follows:

(a) Training should focus on the use of these techniques as tools to improve the contract formation and contract administration process, so as to abate conditions which later lead to disputes, and to expedite decisionmaking under the Contract Disputes Act.

(b) Training should reflect the fact that negotiation is a key dispute resolution method, and that most COs would become more effective professionals by devoting increased training and attention to these methods. The Federal Acquisition Institute and other government entities specializing in acquisition training should devote increased attention to listening and communications skills, use of "interest" and "principled" rather than "positional" bargaining, and systematic attention to negotiation techniques. The training should also enable a CO to engage in meaningful discussion with a contractor by first working as a "team builder" to develop a coherent intraagency position that takes into account the views and needs of attorneys, auditors, program managers, engineers and others within the agency. Consistent with best management practice and the Packard Commission Report for greater efficiency in procurement,⁶ the training should encourage the CO, even without the assistance of a third-party neutral, to avert appeals by reducing the number of situations where disputes, encumbered by internal disagreements or incoherent positions, are passed on to boards of contract appeals.

(c) Professional organizations concerned with the public contract disputes process, such as the American Bar Association, Federal Bar Association, and National Contract Management Association, should develop and encourage increased learning opportunities in effective dispute resolution techniques for representatives of the government and private sector.

1. Conference Recommendation 87-11, *Alternatives for Resolving Government Contract Disputes*, 1 CFR §305.87-11, describes one aspect:

The dispute handling system established by the Contract Disputes Act begins with the contracting officer ("CO"), an agency official whose function is to enter into and administer government contracts. Any claim arising out of a contract is to be presented to the CO. The CO has a dual role: to represent the government as a party to the contract, but also to make initial decisions on claims subject to certain procedural safeguards. If the dispute is not amicably resolved, the CDA requires the CO to issue a brief written decision stating his or her reasons. A contractor dissatisfied with a CO's decision may appeal either to an agency board of contract appeals or directly to the U.S. Claims Court, where proceedings become considerably more formal.

2. This report addresses only dispute resolution during contract performance; it does not extend to controversies which arise during the contract formation process.

3. 41 U.S.C. §§601-613; 5 U.S.C. §5108(c)(3); 28 U.S.C. §§1346(a)(2), 149(a)(2), 2401(a), 2414, 2510, 2517, 31 U.S.C. §1304(a)(3)(C) (1982); enacted November 1, 1978 by Pub. L. No. 95-563, 92 Stat. 2383.

4. Section 33.204 of the Federal Acquisition Regulation, which guides agency procurement practices, includes the following possible inducement to ADR:

In appropriate circumstances, the contracting officer, before issuing a decision on a claim, should consider the use of informal discussions between the parties by individuals who have not participated substantially in the matter in dispute, to aid in resolving the differences.

This suggestion for a "fresh look" at the issues recognizes the potential usefulness of an objective evaluation.

5. They include arbitration, mediation, minitrial, factfinding, convening, facilitation and negotiation. These are defined in the Appendix to Conference Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR §305.86-3.

6. *A Quest for Excellence*, Final Report by the President's Blue Ribbon Commission on Defense Management (June 1986).

Recommendation 89-3:
Conflict-of-Interest Requirements for Federal Advisory
Committees (Adopted June 15, 1989)

The law and practice regarding conflict-of-interest requirements for federal advisory committee members have developed from the interaction of three statutory schemes: the Federal Advisory Committee Act,¹ the conflict-of-interest laws, and the federal personnel laws. However, none of these statutory schemes was drafted to deal specifically with conflict-of-interest standards for government advisers.

In 1982 the Office of Government Ethics issued guidance to agencies that sought to meld a coherent analytical framework from the three statutory schemes. In determining whether the conflict-of-interest laws applied, the Office distinguished between those advisers who were selected as committee members because of their individual qualifications, and were thus deemed to be special government employees (SGE's), and those who instead were selected as representatives of nongovernmental groups or organizations (or in some cases, as independent contractors). While this guidance has reduced the confusion somewhat, the determination of a committee member's status as an SGE or a representative of a nongovernmental group or organization remains difficult, and agency practice in classifying advisory committee members as SGE's or representatives varies greatly and often appears arbitrary.

The classification of an advisory committee member as an SGE or a representative is significant because only the former are subject to the conflict-of-interest and financial disclosure laws. The most significant of these laws for advisory committee members is Section 208 of Title 18, United States Code, which makes it a criminal offense to participate "personally and substantially" as a government employee "through decision, *** recommendation, the rendering of advice, investigation, or otherwise in *** any particular matter in which to his knowledge, he, his spouse, minor child, partner, organization *** has a financial interest." The term "particular matter" in section 208 has been interpreted broadly by the Department of Justice and the Office of Government Ethics to extend to all discrete matters that are the subject of agency action, including rulemaking and general policy matters.²

Section 208 is especially a problem for advisory committee members. Often they have been selected precisely because they are especially well qualified to provide advice concerning problems in a particular field in which they themselves may be active both professionally and financially.

Because of its breadth, Congress provided for agency waivers of section 208's prohibition, either by rule or on a case-by-case basis, where the appointing official makes a determination that the employee's interest is too remote or insubstantial to affect the integrity of his or her services.

Agencies, however, may be unable or reluctant under current law to grant a waiver where a financial interest is significant, even though the agency concludes that any bias arising from that interest will be offset through committee balance, disclosure of the interest, or the individual's status as only an adviser and not as a decisionmaker.

Faced with the specter of criminal liability and the limitations of waivers, or simply for administrative convenience, some agencies have adopted a policy of declaring most or all of their advisory committee members to be interest group representatives, rather than SGE's, except in the clearest cases. Thus, in practice, agencies may be requiring too little disclosure from members who are not SGE's, while imposing significant burdens, principally potential criminal liability, on those members who are SGE's.

In this recommendation the Conference urges the establishment of a uniform minimal disclosure requirement for all advisory committee members, whether or not they are classified as SGE's.³ The recommendation seeks to balance the government's and the public's need for information to evaluate potential conflicts of interest and the burden placed on the individual who agrees to serve on an advisory committee, frequently without pay.

The Conference also recommends that Congress direct agencies to determine, when chartering or renewing the charter of an advisory committee, whether or not the committee's responsibilities require identifying its members as special government employees for purposes of the conflict-of-interest laws. The recommendation (§12) includes criteria for making this determination. This approach places the burden of foreseeing and preventing conflicts of interest on the agency that seeks an individual's services on an advisory committee, rather than on the individual asked to serve, as does reliance on §208 waivers.

This recommendation does not extend to privately established advisory committees that are utilized for advice in particular matters because the members of these committees are not appointed by a federal agency. Consequently, an agency's relationship with such committees must be considered on a ad hoc basis. Nevertheless, the Conference believes agencies should be alert to possibilities for bias or self-interest in the advice of utilized committees and, where appropriate, should request information respecting the affiliations and interests of the members.

RECOMMENDATION

1. Disclosure by Advisory Committee Members.

(a) Congress should require that each individual selected to serve on a federal advisory committee, excluding a regular government employee, furnish to the agency or appointing authority at the time of the appointment or designation--

(1) the identity of the individual's principal employment;

(2) a list of positions held (whether paid or unpaid) and any contractual relationships for the performance of services with any corporation, company, firm, partnership or other business enterprise, any non-profit organization, any labor organization, or any educational or other institution whose activities or purposes may be (or may foreseeably become) relevant to the purposes and functions of the advisory committee as determined by the agency or appointing authority and described in the committee charter;

(3) the identity, but not value or amount, of any other sources of income or any interests in a trade or business, real estate, or other asset held for investment or production of income, exceeding \$1,000 in value which are relevant to the purposes and functions of the advisory committee as determined by the agency or appointing authority and described in the committee charter;

(b) Advisory committee members should be required to file updated disclosure reports annually.

(c) The agency or appointing authority should make publicly available the information furnished pursuant to subparagraphs (a)(1) and (a)(2) above. The financial information described in subparagraph (a)(3) should ordinarily be held confidential unless the member consents to its release or the agency determines after consulting with the member that public disclosure is required in the public interest.

2. Classification of Advisory Committee Members.

Congress, by amendment to the Federal Advisory Committee Act or other pertinent statute, should require that each agency determine, when chartering or renewing the charter of an advisory committee, whether its responsibilities are such as to require some or all of its members to be identified as special government employees for purposes of the conflict-of-interest laws. Congress should require the agency to consult with the Office of Government Ethics in making such a determination, and it should direct the agency to be guided by the following considerations--

(a) Ordinarily, where an advisory committee is expected to provide advice of a general nature from which no preference or advantage over others might be gained by a particular person or organization, the members of the committee need not be special government employees.

(b) The members of an advisory committee which renders advice with respect to the agency's disposition of particular matters involving a specific party or parties should be considered special government employees.

(c) The principal consideration in classifying an advisory committee member should be the nature of the committee's function rather than whether or not the member receives compensation.

3. Coverage.

This recommendation applies to advisory committees which are established and whose members are appointed or designated by the federal government, and to advisory committees whose operations are funded by the government. It does not apply to privately established advisory committees which are "utilized" by the federal agencies in particular matters.

4. Technical Amendment.

Congress should amend 18 U.S.C. §207 (g) to provide that a partner of a special government employee shall not be barred from any representational activity because of that employee's participation in a particular matter where the employee himself would not be barred from such representation by 18 U.S.C. §203 or §205.



Officers in the Public Health Service awaiting remarks from FDA Commissioner Dr. Frank Young at the Conference's July 25 colloquy.

1. 5 U.S.C. App. I

2. The test of whether a financial interest exists with respect to the matter is whether the government action in which the employee participates will have a "direct and predictable effect" on the entity in question. Participation in the presence of a known conflict constitutes a violation of section 208, whether or not the employee's action furthers or is likely to further his or her financial interest.

Recommendation 89-4:

Asylum Adjudication Procedures (Adopted June 16, 1989)

Providing asylum to the persecuted is a vital and treasured part of the American humanitarian tradition. It deserves reaffirmation and continued commitment. The asylum process, however, can also become a misused exception in the nation's immigration laws, especially in a time of improved transcontinental travel and communications. Two important public values thus come into conflict in the asylum program. On the one hand stands the promise of refuge to the persecuted; on the other stands the demand for reasonable assurance of national control over the entry of aliens. This tension becomes acute whenever application numbers rise.

In the 1970s, the United States received approximately 2000 applications for asylum each year. By 1988, that number had risen to approximately 60,000 applications. The Immigration and Naturalization Service (INS) projects 100,000 applications in 1989. Government expenditures for coping with the increase have risen rapidly, both for adjudication and for detaining or otherwise arranging to shelter and feed the applicants. But this is necessarily only a stopgap measure. It would be far more cost effective in the long run to devote the resources necessary to improve asylum adjudication procedures.

Although it should be possible to distinguish qualified from unqualified asylum applicants and thereby both honor the humanitarian tradition and avoid misuse of the asylum provision, several factors hinder our ability to do so. First, the "well-founded fear of persecution" standard, upon which asylum is based, is far from self-defining; there is no uniform understanding of its application to particular cases. Second, judgments about the relative risks faced by asylum seekers upon return to their native countries are unavoidably affected by preconceptions about what conditions may be like in those countries. It may also be misleading to posit a sharp distinction between economic migrants and political refugees. Asylum seekers represent a spectrum of motivations, and many leave their home countries because of a mix of political and economic reasons. Third, the facts upon which adjudication must rest are elusive, largely because they turn on conditions in distant countries. Moreover, the individual applicant, often inarticulate and uneasy, may be the only available witness to the specific events that underlie the claim. Therefore, credibility determinations can be crucial, but they are complicated by barriers to effective cross-cultural communication. Improvements in the system must make allowance for all these difficulties.

The central standard for determining whether an applicant will be granted asylum derives from the definition of "refugee" contained in a United Nations (UN) treaty, the 1951 Convention relating to the Status of

Refugees, amended by its 1967 Protocol. Under section 208 of the Immigration and Nationality Act (INA), the Attorney General may, in his discretion, provide asylum to applicants who establish that they have a "well-founded fear of persecution" in the home country because of race, religion, nationality, membership in a particular social group, or political opinion. Additionally, section 243(h) of the INA establishes a mandatory country-specific protection which is known as *nonrefoulement*. Section 243(h) provides that the government may not return an alien to a country where his "life or freedom would be threatened" on any of the same five grounds. Under current administrative practice, the most important test has become the "well-founded fear" standard, because people granted asylum status are necessarily shielded against removal from the United States.

Historically, the United States has employed a mix of adversarial and nonadversarial procedures for deciding on asylum and *nonrefoulement* claims. Currently, "walk-in" claims are adjudicated by examiners in the district offices of the INS after an essentially nonadversarial interview. It typically lasts about twenty minutes as the interviewer reviews the application form (I-589) and the applicant's supporting information, and also prepares and issues work authorization papers (provided that the claim is adjudged "nonfrivolous"). The file is then sent to the State Department for its advisory views. The applicant is given fifteen days to respond to any recommendation by the State Department to deny the application. Subsequently, an INS examiner will review the file and issue a decision. This process may take eight months or more. Informal review of district office decisions is provided by the Asylum Policy and Review Unit (APRU), a small office in the Department of Justice created in April 1987.

Denials in the district office are not appealable, but unsuccessful applicants may renew the application in adversarial exclusion or deportation proceedings before an immigration judge, who will consider the matter *de novo*. These judges are officials in the Executive Office of Immigration Review (EOIR), which is wholly separate from INS but is also a part of the Department of Justice. Aliens who do not file for asylum until such proceedings have started have no access to the district office; they will be heard only by an immigration judge.

The immigration judge's ruling on asylum is appealable to the Board of Immigration Appeals (BIA), which is also located in EOIR. Appeals can easily consume a year or more, largely because of delays in receiving transcripts of immigration court hearings. No further administrative appeals are possible at the instance of the applicant, but on rare occasions, cases are considered by the Attorney General personally upon certification or referral. Judicial review of individual asylum denials almost always occurs as part of the review of exclusion or deportation orders under section 106 of the INA.

Administrative adjudication alone involves five distinct administrative units (the District Office, the State Department, APRU, the

Immigration Judges, and BIA), only two of which see the applicant in person. This multiplicity of agencies spreads resources thin, resources that should be concentrated efficiently so as to improve the quality of the procedure and assure that genuine refugees are granted asylum.

Adjudication of an asylum claim through the various administrative and judicial levels requires several months and often consumes years. Such delays increase the attraction for marginal applicants because applicants can enjoy substantial benefits, including work authorization and freedom of movement, throughout the period their claim is pending. Deterrents such as detention or limitations on work authorization could be used to minimize this magnet effect. Those measures, however, carry substantial disadvantages. Primarily, they are indiscriminate in their impact and may fall most heavily on genuine refugees who have already suffered greatly. These measures also entail higher costs for the federal government, especially when asylum claims remain pending for lengthy periods.

The Conference believes that fair but speedy conclusion of adjudication, leading either to a grant of asylum or to an enforceable removal order, is crucial to any healthy asylum adjudication system. This objective can be promoted through attention to two elements. First, delay derives in part from the provision of two separate rounds of *de novo* consideration of asylum claims. One unified initial asylum proceeding should be established instead. (If the alien has other defenses to deportation or exclusion, those other defenses should continue to be heard by immigration judges in contemporaneous and separate proceedings). Second, additional delay derives from the qualified right to counsel as specified by current statutes and regulations, which provide for counsel in exclusion or deportation cases "at no expense to the government." Because so many applicants are indigent, delays often result from the need to accommodate the schedules of those attorneys who are willing to take the cases on a *pro bono* basis--a problem that is compounded when applications increase in a particular geographic location. A healthy system of asylum adjudication must be able to schedule hearings expeditiously, even if *pro bono* counsel are not immediately available in sufficient numbers. Fairness must be sought, therefore, through hearing procedures, training, and monitoring that assure a special role for the adjudicator in developing a complete record when the applicant is not represented.

The Conference also believes that a healthy asylum adjudication process must foster the greatest possible accuracy as well as public confidence that decisions are rigorous, professional, and unbiased. Reliance on a specialized adjudicative board without routine reference of applications to the State Department would serve these ends and minimize any perception that asylum decisions are influenced by political considerations. Additionally, arrangements must be made to provide the adjudicators with information concerning foreign country conditions that

is as accurate and complete as possible, derived from a wide variety of sources, both to help dislodge any preconceptions and to foster systematic expertise for use in developing the record and making the ultimate judgment on the claim.

For several years the Department of Justice has been considering amended asylum regulations that would serve many of these ends. A version proposed in August 1987 [52 Fed. Reg. 32552] would have established a specially-trained corps of adjudicators, responsible to the INS Central Office rather than to the district directors, and it would have eliminated de novo reconsideration of asylum claims by immigration judges. These regulations drew criticism, in part because of concern about the professionalism and independence of the adjudicators, and the Department responded with modified proposed regulations in April 1988 [53 Fed. Reg. 11300] that retained the new corps of adjudicators but also restored the availability of de novo consideration before the immigration judges. Those regulations are still pending in the Attorney General's office and the Department has encouraged this study and analysis.

RECOMMENDATION

The Attorney General should adopt regulations creating a new asylum adjudication process that would eliminate much of the duplication and division of responsibility associated with the current complicated system. Resources should be applied to enhance the professionalism, independence, and expertise of the adjudicators, and to assure fair and expeditious adjudications, so that genuine refugees may be speedily given a secure status and unqualified applicants, absent circumstances which would allow them to remain in this country, may be promptly deported.

I. Creation of a New Asylum Board

The Attorney General should create a new Asylum Board located, for administrative purposes, within the Executive Office of Immigration Review (EOIR) of the Department of Justice and consisting of an adjudication division, an appellate division, and a documentation center. The chairperson of the Asylum Board would be responsible for administrative support and supervision of the operations of all three units.

A. The Adjudication Division

1. **Jurisdiction.** All claims for asylum under section 208 of the Immigration and Nationality Act (INA) or withholding of deportation under INA section 243(h) (hereinafter collectively "asylum" claims) should be heard exclusively by asylum adjudicators in the adjudication division of the Asylum Board.

2. **Nature of the asylum hearing.** Asylum claim proceedings should be recorded.¹ The asylum adjudicator should be responsible for developing a complete record of the specific facts relating to the applicant's claim, including those which might support a grant of asylum and those which might cast doubt on the claim or on the applicant's credibility. Care should be taken to assure the service of skilled interpreters. The adjudicator should be responsible for most of the questioning, with a reasonable and adequate opportunity for additional questioning and entry of relevant information, including the presentation of witnesses, by the applicant and counsel. The Immigration and Naturalization Service (INS) should not be represented as an opposing party in the proceedings.²

3. **Representation of applicants.** Applicants should be encouraged to secure counsel (or a qualified nonattorney representative) to develop the initial claim and to provide representation during the asylum proceeding. Although reasonable accommodation should be provided for counsel to be obtained, proceedings should not be unduly delayed, because expeditious initial decisions are essential.

4. **Use of official notice of country conditions.** Asylum adjudicators should develop substantial cumulative expertise regarding country conditions, to be used in developing the record, and should be responsible for posing illuminating questions to the applicant and other witnesses, for evaluating evidence, and for reaching the ultimate determination about likely risks to the applicant upon return to the home country. The accepted standards for official notice, in accordance with the Administrative Procedure Act, should govern use of such information. Ordinarily, these standards will simply require an adequate statement of reasons for accepting or rejecting the asylum claim, reflecting such expertise. In instances when specific and detailed facts developed from the documentation center or other sources (and not from information supplied by the applicant) appear to be crucial, the applicant should be given notice of intent to deny based on such information, along with an opportunity to offer information or argument in rebuttal.

5. **The adjudicators.** Asylum adjudicators should be recruited from among attorneys possessing adjudicative skills and appropriate judgment and temperament, with close attention given to those who are familiar with international relations and refugee affairs and who are sensitive to the difficulties of cross-cultural communication. Adjudicators should receive salary, benefits, and guarantees of adjudicative independence equivalent to those of immigration judges, and they should be assigned no other enforcement or adjudication responsibilities. The adjudicators should be given thorough and ongoing training, especially on techniques for fairly conducting this specialized type of proceeding

and on conditions in those countries from which a substantial number of asylum applications is received. If, alternatively, a separate Asylum Board is not created and the adjudication assignment is given to immigration judges, then such judges should be assigned to a separate unit in EOIR.

B. Appellate Division

1. **Composition and functions.** The appellate division of the Asylum Board should consist of the chairperson and two additional members, assisted by staff attorneys and other support personnel. The division's principal responsibilities should be to consider appeals filed by persons denied asylum at the initial stage, in light of the administrative record compiled before an adjudicator, and such other information as the applicant may wish to submit or of which official notice may be taken. The division, however, should also monitor cases, and should have the authority to require certification to it of selected cases, either granting or denying asylum, in order to foster consistency, fairness, and political neutrality. It will thus absorb the principal functions now performed by the Asylum Policy and Review Unit.

2. **Certification or referral to the Attorney General.** The Attorney General should retain the authority to review decisions of the Asylum Board, upon formal certification or referral or *sua sponte*.

3. **Expeditious completion of appeals.** A high priority should be placed on completing all asylum appeals expeditiously, preferably within three months of filing. The Department of Justice should ensure that transcripts, where required, are made from recorded hearings in a timely fashion.

C. Documentation Center

A documentation center, staffed with regional specialists, should maintain current and detailed information on country conditions, from both governmental and nongovernmental sources, periodically compile and publish usable summaries on selected countries, and respond to requests for more specific information received from officials of the Asylum Board. Special effort should be devoted to assuring complete compilations of ongoing reports from established nongovernmental human rights organizations, and to drawing upon information from documentation centers in other countries. Information and procedures developed by other countries can be particularly useful in minimizing start-up costs. The center's collections and publications shall be accessible to the public.

D. Role of the Department of State and the United Nations High Commissioner for Refugees

The Department of Justice should take advantage of resources, assistance, and information available through the State Department and the United Nations High Commissioner for Refugees (UNHCR). In particular, arrangements should be made with both to assist in training adjudicators and to augment information available through the documentation center.

If it so requests, on an across-the-board or country-specific basis, the State Department should receive notice of individual asylum applications, so that it may offer its judgment, in particular, about appropriate responses in sensitive cases, such as those involving foreign government officials.

II. Detention

Where detention of asylum seekers is deemed necessary,³ the Department should limit it to short-term detention in "asylum processing centers," as recommended by the Select Commission on Immigration and Refugee Policy. Such centers should also keep families together wherever possible, minimize the length of detention, provide assistance in securing representation, and otherwise foster conditions which reflect that the purpose of detention is not punitive.

III. Deportation

The Department of Justice should ensure that individuals denied asylum are removed promptly if they are otherwise excludable or deportable, subject to any policy decision by the Attorney General to grant extended voluntary departure to nationals of particular countries.

IV. Judicial Review

Judicial review of asylum denials should be available as part of the review under section 106 of the INA for orders of deportation or exclusion. Appropriate arrangements therefore should be made to combine, for purposes of judicial review, the record of proceedings before the Asylum Board with that of the regular deportation or exclusion proceedings before the immigration judges and the Board of Immigration Appeals.

1. The Administrative Conference recommends experimentation with other methods for creating a record that would maintain flexibility but preserve objectivity, professionalism, and fairness to the applicant.

2. The Administrative Conference takes no position on the possible application of the Equal Access to Justice Act to asylum proceedings.

3. The Administrative Conference does not take a position on the suitability of detention in asylum proceedings.

Recommendation 89-5:
Achieving Judicial Acceptance of Agency Statutory Interpretations (Adopted June 16, 1989)

Agencies continually interpret the statutes they administer. Their interpretations are expressed in a great variety of formats -- including, among others, legislative regulations, adjudicatory opinions, court briefs, interpretive rules, policy statements, staff instructions, correspondence, informal advice, press releases, guidance manuals, testimony before Congress, speeches, and internal memoranda. This recommendation addresses the relationship between the procedures used by an agency in interpreting a statute and the role of the courts in statutory interpretation.

Interpretation of a statute presents a question of law, traditionally the province of the judicial branch (see the scope of review provision of the APA, 5 U.S.C. §706). However, for many years courts have accorded respectful attention or even controlling effect to interpretations of statutes made by the agencies that administer them. In some situations, in which the courts reserve the power to arrive independently at their own interpretations, they will give respectful consideration to an agency's construction but may reject it, even if it seems reasonable. In other cases, courts consider themselves bound to accept an agency's interpretation outright, provided only that it is consistent with the statute and is reasonable. The law governing judicial acceptance of agency statutory interpretations is now dominated by *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In that case, one involving legislative rulemaking, the Supreme Court laid out a general framework for reviewing agency interpretations of statutes. First, the court is to determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, the court (like the agency) must give effect to the congressional intent. Where Congress' intent is not clear, however, the court must determine whether the agency's interpretation is based on a reasonable construction of the statute. *Chevron* thus requires a reviewing court to accept an agency interpretation that (a) is not contrary to statute or specific statutory intent and (b) is reasonable.

When an agency issues a legislative rule or interprets its statute in a formal adjudication, its interpretation of the statute it administers is entitled to judicial acceptance under the *Chevron* standard. Similarly, acceptance under the *Chevron* standard is appropriate if the reviewing court finds a congressional delegation of authority to make definitive interpretations in an informal format such as the informal agency staff ruling involved in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980). But agencies rarely possess congressionally delegated authority to make definitive interpretations, carrying the force of law, by informal means.

Thus, when an agency states its interpretation of a statute in an informal format, it should understand that courts ordinarily will not be bound to accept such an interpretation.

This is not to say that reviewing courts may ignore an agency interpretation set forth in an informal format. Numerous decisions of courts at all levels indicate that the views of the agencies charged with responsibility for administering a statute are accorded weight and may be highly influential in shaping courts' decisions. In this way courts retain the advantage of administrative agencies' expertise and remain free to adopt agencies' interpretations, even though not required to do so.

Even when interpretations are expressed informally, however, agencies have in some instances successfully asserted that these interpretations should be accepted as definitive by the courts, without consideration of whether the agency possesses the authority to make binding interpretations in the format it has used.

The Conference believes that agencies should seek *Chevron* acceptance for their interpretations only when they are the product of procedures authorized by Congress for the issuance of interpretations having the force and effect of law. These procedures, in almost all cases, will be relatively formal ones that ensure some level of public participation and encourage reasoned and thoughtful decisionmaking by the agencies. However, this recommendation is not intended to discourage agencies and their staffs from using informal means to keep the public apprised of their views on questions of statutory interpretation. It is often useful and appropriate for agencies to provide informal guidance of this type. But it is important for both agencies and courts to remember that these informal expressions should not be accorded the same weight as definitive agency interpretations. When an agency interprets a statute without using the procedures authorized by Congress for the development of definitive statutory interpretations, it should not expect that its interpretation is entitled to judicial acceptance as definitive. The agency may reasonably expect, however, that the interpretation is entitled to such special consideration as its nature and the circumstances of its adoption warrant.

This recommendation relates solely to the procedures that should be preconditions to agencies' assertion of the *Chevron* standard of review. It thus takes no position concerning any other aspect of the *Chevron* standard.

Accordingly, the Administrative Conference recommends that the following process be observed.

RECOMMENDATION

In developing an interpretation of a statute that is intended to be definitive, an agency should use procedures such as rulemaking, formal

adjudication, or other procedures authorized by Congress for, and otherwise appropriate to, the development of definitive agency statutory interpretations.

Recommendation 89-6:
Public Financial Disclosure by Executive Branch
Officials (Adopted June 16, 1989)

Public financial disclosure by federal officials is intended to make it possible to monitor actual or potential conflicts of interest of such officials. This, in turn, may deter public officials from even considering conduct that would present the appearance of a conflict of interest. However, these benefits of public financial disclosure must be balanced against the burdens imposed on the federal officials who are subject to them.

Determining appropriate public financial disclosure requirements requires an assessment and accommodation of three concerns: the relevance of the information to conflicts of interest which might be faced by the individual in his or her official capacity; the practical burden faced by an individual who must assemble and report information accurately (including whether a nominee or employee would reasonably be expected to have at hand the information which he or she is required to report); and the psychological burden imposed on an individual who must make his or her financial status publicly available to others (i.e., whether public disclosure constitutes an excessive invasion of privacy).

The Administrative Conference has studied the Ethics in Government Act's executive branch financial disclosure requirements (codified at 5 U.S.C. §§201-209) and in this recommendation urges Congress to make specific changes to those requirements, consistent with an appropriate balance of the benefits and costs of such disclosure.

This recommendation is not made with the intention of generally requiring either more or less disclosure of public officials. Rather, the Conference's goal is to rationalize the Ethics in Government Act's requirements and eliminate those that appear to bear no reasonable relationship to the Act's purposes. On the one hand, the recommendation increases disclosure by reducing the current threshold level for the reporting of a covered individual's liabilities from \$10,000 to \$1,000, to be consistent with the current threshold level of \$1,000 for the reporting of assets (2 b (1)). On the other hand, the recommendation would lessen disclosure by reducing the number of categories of value for the reporting of assets from the current six to two, which the Conference believes is

sufficient for conflict-of-interest analysis and the maintenance of public confidence in the integrity of executive branch officials (§2 b (2)).

Because the Act's executive branch financial disclosure provisions are so detailed, this recommendation has been organized to clearly distinguish between current provisions that the Conference believes generally further the Act's purposes and, therefore, should be retained, and those provisions that appear unnecessary to achieve the Act's purposes and, therefore, should be eliminated or changed. However, in recommending the retention of particular provisions, the Conference does not mean to imply that such provisions cannot be improved. To the contrary, the Conference urges the Congress to systematically review the coverage and language of all of the Act's public financial disclosure provisions, and to rewrite those that can be made clearer and simpler.

To illustrate, the Conference recommends continuation of the current requirement that nominees for positions covered by the Act report the source of all earned income in excess of \$5,000 received by a reporting individual from one source in the two years preceding the year of filing (§2 a (2)). However, the current statutory provision (5 U.S.C. §202(a)(6)(B)) requires reporting of such compensation paid "in any of the two calendar years prior to the calendar year during which the individual files his first report . . ." If strictly applied, a nominee who filed a report in October of 1989 would be required to disclose such compensation for calendar years 1987 and 1988, but not for the period in 1989 prior to his or her entering government service. This theoretical gap in coverage should be closed whether or not in practice it has proven to be a problem.

The same statutory provision exempts from the "over-\$5,000 from one source" disclosure requirement the reporting of "any information with respect to any person for whom services were provided by any firm or association of which such individual was a member, partner, or employee unless such individual was *directly involved* in the provision of such services." 5 U.S.C. §202 (a)(6)(B)(emphasis added). In redrafting this provision, Congress should consider either defining the term "directly involved" or delegating to the Office of Government Ethics the responsibility to clarify its meaning by regulation, especially as applied to individuals who provide services to others, such as lawyers. Therefore, although the Conference supports the retention of the substance of this and other of the Act's financial reporting provisions, it is clear that improvements to the language and coverage can be made.

Because of its limited mandate,¹ the Conference takes no position on the public financial disclosure requirements applicable to legislative and judicial branch officials. However, the similarity of those requirements to executive branch requirements suggests the desirability of reviewing and possibly amending legislative and judicial branch requirements as well.

RECOMMENDATION

1. PERSONS REQUIRED TO FILE.

a. Positions For Which Coverage Should Be Retained. Congress should continue to require the following categories of executive branch personnel to make public financial disclosure:

(1) The President, Vice President, and nominees for and incumbents in positions which require Senate confirmation;

(2) Full-time officers and employees of the executive branch (including independent agencies) whose positions are classified as GS-16 or above or who are paid at or above the minimum rate of pay fixed for GS-16;

(3) Each member of a uniformed service whose pay grade is at or in excess of O-7;

(4) The Postmaster General, Deputy Postmaster General, each Governor of the United States Postal Service, and each Postal Service and Postal Rate Commission officer or employee whose rate of pay equals or exceeds the minimum rate of basic pay for GS-16;

(5) Each administrative law judge appointed pursuant to 5 U.S.C. 3105; and

(6) All other employees determined by the Director of the Office of Government Ethics to be in positions equal in responsibility to those normally classified at GS-16 or above.

b. Positions For Which Coverage Should Be Removed. Congress should amend the Ethics in Government Act to remove the reporting requirement, except as may be required under subsection c below, from the following persons:

(1) Candidates for the offices of President and Vice President who are not receiving federal funds under the federal election laws and who are not government officials otherwise required to report;²

(2) Special government employees;³ and

(3) Designated agency ethics officers whose rate of pay or other responsibilities would not otherwise subject them to the reporting requirement.

c. Administrative Extensions of Coverage. Congress should amend the Ethics in Government Act to permit the Director of the Office

of Government Ethics to extend the reporting requirement, on a position or categorical basis, to any officer, employee or special government employee of the executive branch not covered by the Act, whose position is determined by the Director to present an unusual opportunity for conflicts of interest.

d. Administrative Exemption From Coverage. Congress should amend the Ethics in Government Act to permit the Director of the Office of Government Ethics to exempt from the reporting requirement those positions included in subsection a above whose responsibilities are identified by their agencies and determined by the Director to be unlikely to place their incumbents in situations of conflict of interest.

e. Review of Coverage Extensions and Exemptions. Congress should require the Office of Government Ethics annually to review, based on the recommendation of the designated agency ethics officials, all determinations currently in effect under c and d above.

2. INFORMATION REQUIRED TO BE FILED.

a. Reporting Requirements That Should Be Retained. Congress should leave the Ethics in Government Act unchanged in the following respects:

(1) *Reporting by Both Incumbent and Nominated Officials*. Congress should continue to require both incumbent executive branch officers and employees whose positions are covered by the Ethics in Government Act, and nominees for those positions, to disclose publicly the following categories of information:

(a) the identity of any interest in a trade or business or asset held for investment or production of income, if the value of the interest exceeds \$1,000;

(b) the identity of all positions held by the reporting individual as an officer, director, trustee, partner, proprietor, representative, employee or consultant of any corporation, company, firm, partnership, or other business enterprise, any non-profit organization, any labor organization, or any educational or other institution other than the United States, but not including positions held in religious, social, fraternal, or political entities, or positions solely of an honorary nature; and

(c) the date, parties to, and terms of any future employment arrangements negotiated by the

reporting individual, leaves of absence during the period of federal service, continuing payments from a former employer, or continuing participation in a former employer's welfare or benefit plan.

(2) *Reporting Only by Nominated Officials.* In addition to the information required to be reported by incumbent and nominated executive branch officers and employees under subsection (1) above, Congress should continue to require that nominees for positions covered by the Ethics in Government Act report the source of all earned income in excess of \$5,000 received by the reporting individual from one source in the two years preceding the one in which the nominee files, and a brief description of the services for which the compensation was paid. As current law provides, this requirement should not apply to information about any person for whom services were provided by the firm or association of which the nominee was a member, partner, or employee, unless the nominee was directly involved in the provision of such services.

(3) *Reporting Only by Incumbent Officials.* In addition to the information required to be reported by incumbent and nominated executive branch officers and employees under subsection (1) above, Congress should continue to require covered incumbent executive branch officers and employees to disclose the following categories of information:⁴

(a) the source, type and amount of non-governmental earned income received by the reporting individual, including honoraria, which in the aggregate exceeded \$100; and

(b) the date and a brief description of each purchase, sale or exchange of real property, stocks, bonds, commodities futures or other property with a value over \$1,000, except (i) transactions between the reporting individual and a spouse or dependent children, (ii) transactions involving a personal residence of the reporting individual or the individual's spouse, and (iii) transactions involving an investment in the nature of a cash equivalent (e.g., a money market fund, certificate of deposit, or personal bank account.)

(4) *Interests of Spouses and Dependent Children.* The present statutory provisions on reporting of the interests of spouses and dependent children of the reporting official should be retained.

b. Reporting Requirements That Should be Changed. Congress should amend the Ethics in Government Act to change the reporting requirements in the following ways:

(1) *Liabilities.* The present requirement of reporting the identity of liabilities in excess of \$10,000 owed by the reporting individual should be changed to a requirement of reporting liabilities in excess of \$1,000, the same value which the statute now uses for reporting of assets. As present law provides, the reporting requirement should not extend to the individual's home mortgage, loans for the purchase of personal property which are secured by the property purchased and which do not exceed the value of the security, sums owed to a relative, and revolving charge accounts with a balance less than a specified amount at the end of the reporting period (currently \$10,000).

(2) *Categories of Value.* The present requirement that assets, liabilities, and transactions in assets above the \$1,000 threshold be reported in numerous categories of value should be eliminated. However, in order to distinguish large interests from those of lesser significance, the reporting individual should be required to state whether each particular asset, liability or transaction was in excess of a specified higher amount (e.g., \$50,000 or \$100,000 each).

(3) *Sources of Earned Income Prior to Government Service.* The requirement that all nominees for covered positions report the source, type and amount of non-government earned income which they received in the year prior to entering government service should be eliminated, except for amounts in excess of \$5,000 received from one source (see 2 a (2) above).

(4) *Income from Assets Otherwise Reported.* The requirement that both incumbents and nominated officials report income in excess of \$100 from each of their investments should be eliminated because the assets themselves are already reported.

(5) *Reimbursements and Gifts.*

(i) Reporting Period. The date after which all covered reimbursements and gifts should be required to be reported should be the date on which the official is nominated for or appointed to the position covered by the Ethics in Government Act, not the date the official takes office.

(ii) Reimbursement and Gifts of Travel or Entertainment. The threshold amount for reporting reimbursements and gifts of transportation, lodging, food or entertainment, other than personal hospitality from

an individual, received by the reporting individual from any source other than a relative during the reporting period should be changed from \$250 per year to a per event amount (e.g., \$100 or \$150) to avoid reporting de minimis information. The statute should be amended further to require, in addition to the source and a brief description, the reporting of the value or amount of such reimbursements or gifts in broad categories (e.g., under \$1,000; \$1,000 to \$10,000; over \$10,000) in accordance with regulations issued by the Office of Government Ethics.

(iii) All Other Covered Gifts.

The requirement of reporting all gifts to the reporting individual, other than gifts of transportation, lodging, food or entertainment, which aggregated more than \$100 in value over the reporting period, excluding gifts from relatives of the reporting individual, and not aggregating gifts of \$35 or less in calculating the \$100, should be retained. However, the statute should be amended to require, in addition to the source and a brief description, the reporting of the value or amount of such gifts in broad categories (e.g., under \$1,000; \$1,000 to \$10,000; over \$10,000) in accordance with regulations issued by the Office of Government Ethics.

1. The Conference is authorized by statute to study and make recommendations relating to administrative procedure used by administrative agencies in carrying out administrative programs, 5 U.S.C. §574.

2. The Conference recognizes that candidates for these offices are not executive branch officials; nonetheless, this recommendation addresses coverage of candidates because they are included in the current statute setting forth executive personnel financial disclosure requirements.

3. It is noted that the Administrative Conference has recommended minimal financial disclosure for all members of federal advisory committees, including those members who are special government employees. See ACUS Recommendation 89-3, Conflict-of-Interest Requirements for Federal Advisory Committees, 1 CFR §305.89-3.

4. Under current practice individuals who joined the government in the preceding calendar year are only required to report this information for their period of government service and not before.

Recommendation 89-7:
Federal Regulation of Biotechnology
(Adopted December 14, 1989)

New biotechnology techniques promise great benefits in fields such as medicine, agriculture, and manufacturing. However, these new techniques, which involve alteration of the genetic structure of an organism, have raised concerns that some new organisms or products may be dangerous to individuals or detrimental to the environment. This recommendation addresses coordination of federal regulation in this area and the procedures agencies use to regulate biotechnology development, testing and use.

Genetically-engineered organisms are regulated under a variety of statutes enacted to prevent or reduce society's exposure to unsafe or harmful products or substances. The agencies with such statutory authorities currently share responsibilities for regulation of biotechnology in accordance with policy statements issued in 1986 by the agencies and by the Director of the Office of Science and Technology Policy (who serves as the President's Science Adviser).¹ In its policy statement, the Office of Science and Technology Policy (OSTP) attempted to clarify the responsibility of each agency where more than one agency shared jurisdiction to regulate biotechnology areas.

The Conference recommends a continuation of interagency coordination under the auspices of the OSTP. Experience does not currently indicate that new legislation is needed for effective interagency coordination of biotechnology regulation. On the other hand, the Conference believes that both the President and the Congress should monitor closely the coordination process because of the importance of this area to the nation's economic and social well-being.

The Conference also recommends that the President and the Congress, through the OSTP and the Office of Technology Assessment (OTA), survey biotechnology developments and agency regulation of biotechnology under existing statutes to determine whether current law and regulation provide adequate authority to protect public and private interests or whether in particular instances current regulation is unnecessary. The survey should identify whether nonregulation of any particular area reflects an agency decision not to use its authority to regulate or an absence of regulatory authority.

The Conference also urges changes in the coordination role for biotechnology regulation performed by the President's Office of Science and Technology Policy. Most importantly, the Conference urges the President to make the work of the Office's Biotechnology Science Coordinating Committee (BSCC) a high priority. A revitalized BSCC can help agencies coordinate their activities concerning biotechnology development, regulation, funding, and biosafety research. To fulfill this mandate, the Conference believes the BSCC's role should emphasize

fact-finding, reporting, and serving as a clearinghouse for information relating to biotechnology.

The Conference recommends that agencies engaged in biotechnology regulation articulate their policies through generic rules and policy statements to the extent possible. Since public acceptance of agency decisions is especially important in this area and because of the novelty and uncertainty of the risks associated with biotechnology, the Conference encourages agencies to adopt appropriate procedures to allow public participation. Agencies are also encouraged to seek ways to make biosafety information available to the public to the maximum extent consistent with protection of the proprietary interests of submitters of confidential business information.

RECOMMENDATION

1. Biotechnology Regulatory Structure

(a) Interagency coordination is critically needed to mitigate problems caused by concurrent regulation of biotechnology by two or more agencies. The Office of Science and Technology Policy's Biotechnology Science Coordinating Committee (BSCC) should have primary responsibility for identifying issues, exchanging information and preparing reports concerning issues common to several agencies. Responsibility for establishing uniform government policies should be retained by the Office of Management and Budget working in coordination with the BSCC.

(b) The President and Congress should survey biotechnology developments and agency regulation of biotechnology under existing statutes to consider whether and in what respects current regulation of biotechnology is inadequate or excessive. To facilitate this, the President's Office of Science and Technology Policy (OSTP) and Congress' Office of Technology Assessment (OTA) should, jointly or separately, identify all areas of biotechnology activity and determine the extent to which they are being regulated. OSTP and OTA should assess whether or not additional or diminished regulatory authority is desirable in such areas and furnish their findings and recommendations to the President and Congress.

2. Regulatory Coordination

(a) The President should make coordination of the government's activities relating to biotechnology a high priority. This should include:

(1) monitoring the effectiveness of interagency coordination;

(2) directing the Science Adviser to enlarge the membership of the BSCC to include all federal agencies that have substantial responsibilities for biotechnology research, development, or regulatory policy; and

(3) directing the Science Adviser to invite representatives of other agencies to participate in the BSCC's activities, as appropriate, such as when their regulatory or other official responsibilities may be affected.

(b) The BSCC should have a broad subject-matter mandate, including issues of biotechnology development, regulation, funding, and biosafety research. The Committee's role should emphasize fact-finding, reporting, and serving as a clearinghouse for information relating to biotechnology.

(c) The Science Adviser should establish a policy for the BSCC that will foster opening its proceedings to the public.

(1) Meetings of the BSCC should be open to the public unless they involve confidential information.

(2) Members of the public should be allowed to provide comments to the BSCC either orally or in writing.

(3) The BSCC may invite advice from experts outside the government.

(4) The BSCC should keep minutes or other records of its proceedings, including the reasons for closing any meetings.

3. Regulatory Procedures

(a) Agencies should, where appropriate, seek opportunities to promulgate generic biotechnology rules to address recurring regulatory issues.

(b) Agencies should consider the adoption of rules or policy statements to enunciate the principles or criteria they will include in their risk assessment and management decisions. When adopting policy statements, agencies should follow the public participation procedures set forth in Conference Recommendation 76-5.²

(c) Agencies should consider adopting appropriate procedures to allow public participation and other forms of input when making regulatory determinations concerning biotechnology. Such procedures might include:

(1) giving notice to the public with an invitation to submit comments concerning the determination;

(2) providing additional notice of pending regulatory actions to persons who live near sites where proposed activities would take place;

(3) holding informal public hearings to supplement written procedures; or

(4) utilizing advisory committees under the Federal Advisory Committee Act.³

(d) Agencies should seek ways to meet the public's need for biosafety information about substances or organisms produced through biotechnology, without divulging confidential business information.⁴ Such steps might include:

(1) requesting submitters of confidential business information to focus their claims for confidentiality as much as possible;

(2) requiring submitters of data that include confidential business information to identify those portions that are claimed to be confidential and to substantiate their claims at the time of submission; and

(3) summarizing or aggregating confidential data in a manner that does not compromise confidentiality.



Administrative Law Judge Alan Heifetz and Social Security Administration Associate Commissioner Eileen Bradley deep in thought at the June plenary session.

1. OSTP, Coordinated Framework for Regulation of Biotechnology; Announcement of Policy and Notice for Public Comment, 51 Fed. Reg. 23302 (1986).

2. ACUS Recommendation 76-5, Interpretive Rules of General Applicability and Statements of General Policy, 1 CFR § 305.76-5 (1989).

3. See ACUS Recommendation, 82-5, Federal Regulation of Cancer-Causing Chemicals, Part IV, 1 CFR § 305.82-5 (1989).

4. See ACUS Recommendation 82-1, Exemption (b)(4) of the Freedom of Information Act, 1 CFR §305.82-1 (1988).

Recommendation 89-8:

Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions

(Adopted December 14, 1989)

This recommendation examines the obligation of agencies to index and make their adjudicatory decisions available to the public.

The Freedom of Information Act (FOIA) imposes numerous affirmative disclosure obligations on agencies. Under 5 U.S.C. §552(a)(2), each agency, in accordance with published rules, is required to make final adjudicatory decisions and orders¹ available for public inspection and copying unless the materials are promptly published and copies are offered for sale. In addition, each agency shall maintain and make available for public inspection and copying current indexes that provide identifying information for the public as to any matter issued, adopted, or promulgated. FOIA further mandates that each agency shall promptly publish, quarterly or more frequently, and distribute copies of each index unless it determines, by order published in the Federal Register, that such publication is unnecessary and impracticable.

Many agencies do, in fact, index and publish or otherwise make available to the public their adjudicatory decisions, as required under FOIA (e.g., the National Labor Relations Board, the Merit Systems Protection Board, the Interstate Commerce Commission, the Securities and Exchange Commission). This recommendation, then, is addressed to those agencies which either entirely fail to index, publish or make their decisions available to the public or fail to do so adequately, whether or not they use adjudicatory precedent to pronounce and develop agency policy.

Debate has surrounded consideration of an appropriate test for determining which types of adjudicatory decisions are included in this affirmative disclosure obligation. The Attorney General initially expressed the opinion that FOIA requires that agencies index only those decisions cited by an agency or relied upon as precedent. This limitation, in the view of the Attorney General, was derived from both the enforcement provision in the statute, which precludes the agency from giving precedential effect to matters not indexed, and the legislative history of the statute, which indicates that the disclosure provision was intended to make available documents having precedential significance. The Attorney General also was influenced by the impracticality of indexing all agency decisions.

Application of the affirmative disclosure requirements, beyond simply precedential decisions, however, offers several advantages. First, if agencies index all significant decisions, and not just those decisions deemed to be precedential, agencies would be less inclined to be restrictive or one-sided in the selection of cases to be accorded precedential effect. Second, private parties affected by agency action

would be in a better position to learn of and influence agency policy. Third, a broader application of affirmative disclosure requirements would implement the underlying aim of the FOIA indexing requirements which is to afford citizens the essential information needed to deal effectively and knowledgeably with federal agencies and to guard against the development of secret law. Lastly, a current index of final decisions may assist agencies in developing standards and policies with respect to general issues and recurring questions.²

The few cases dealing with the FOIA affirmative disclosure obligations have generally read the precedential test broadly. They require disclosure not only of decisions that an agency considers to be binding but also all decisions that an agency retains for general reference and research. The recommended approach to the indexing and public availability of final decisions focuses less on the binding nature of the precedent and more on the value that decisions can have to inform and assist the public.

RECOMMENDATION

1. Indexing of Agency Decisions

Agencies that do not already do so should compile a subject-matter index of their adjudicatory decisions so as to afford citizens information useful in dealing with the agencies and to assist the development of agency standards and policies on general issues and recurring questions.

In meeting FOIA indexing requirements, agencies should ensure that a subject-matter index is made of their decisions and that the index includes all significant decisions, whether or not the decisions are designated as precedential.

2. Level and Scope of Decisions Indexed

The index should cover the adjudicatory decisions of the agency's highest level tribunal. The agency should also consider whether to index significant lower level decisions that have become final. The adjudicatory decisions intended to be covered by this recommendation are those made with an accompanying written opinion or rationale in contested cases after an opportunity for a hearing at some stage of the proceeding.

3. Index Contents

Agency indexes should be designed for effective and efficient use. These indexes should contain sufficient information on each indexed decision to identify the major issues decided and the location of the case file. Agencies should adopt one of the following practices in indexing their adjudicatory decisions:

A. *Universal Index*. Index all final decisions; or

B. *Selective Index*. Where the volume of decisions makes a universal index impracticable or uninformative, selectively index final decisions omitting those decisions that are repetitive. The selective index should include all significant decisions. Decisions may be significant because they are deemed by the agency to be precedential or otherwise establish a principle to govern recurring cases with similar facts, develop agency policy and exceptions to the policy in areas where the law is unsettled, deal with important emerging trends, or provide examples of the appropriate resolution of major types of cases not otherwise indexed.

4. Public Notice of the Index

Agency indexes should be fully disclosed and readily available. Appropriate notice of the existence of unpublished decisions should also be given in both the agency's FOIA regulations and the procedural or substantive regulations governing the specific program.

5. Computer Technology

Agencies should explore the use of computer technology in order to promote accessibility and reduce costs of indexing.

1. This subsection also covers agency statements of policy and interpretations, as well as administrative staff manuals and instructions to staff that affect a member of the public. The Conference has already recommended that agency policies that affect the public should be articulated and made known to the public to the greatest extent feasible, ACUS Recommendation 71-3 "Articulation of Agency Policies." See also ACUS Recommendation 70-3, "SEC No-Action Letters Under Section 4 of the Securities Act of 1933."

2. In programs where the agency has established apolicy that none of its decisions have precedential effect, the Conference urges that the agency reexamine the feasibility of creating a system that accords certain decisions precential value to provide guidance about the factors that influence their decisions and to ensure better development of agency policy and standards. See ACUS Recommendation 87-7, "A New Role for the Social Security Appeals Council," 1 CFR §305.87-7. See also ACUS Recommendation 71-5, "Procedures of the Immigration and Naturalization Service In Respect to Change-of-Status Applications."

Recommendation 89-9:
Processing and Review of Visa Denials
(Adopted December 15, 1989)

United States consulates around the world complete the processing of some nine million applications for immigrant and nonimmigrant visas each year. Approximately ninety percent are granted; ten percent are denied. Under current practice, the only review of a consular official's denial of a visa may be by a more senior officer in the consulate, or, on points of law, by the Visa Office in the State Department. The Immigration and Nationality Act has been read to preclude administrative review, and the courts, with a few exceptions, have declined to review visa denials.

Immigrant visas are available to persons with close family relationships to U.S. citizens and residents, or with particular abilities or skills that are needed but not otherwise available in the United States. Nonimmigrant visas are available in a long list of classes, ranging from tourists to students to certain types of business personnel to diplomats.

Whatever the visa category or class, there clearly are important interests at stake. These interests are not just those of the applicants themselves, but also of citizens and residents of the United States who are sponsoring the applicant or have some other interest in the applicant's presence in the United States. These interests warrant a close look at whether initial decisions in this important program of mass adjudication should be more fully reviewable than at present.

Federal law and State Department regulations give consular officers substantial discretion in adjudicating visa applications. For example, consular officials exercise absolute discretion in determining whether an applicant may be represented by an attorney or other qualified representative at the visa application interview. Furthermore, although current Department regulations, at 22 CFR §41.121(c), require that a denial of a visa application be reviewed by a more senior officer, the high volume of applications at some posts has resulted in only a random sample of denials being reviewed. Review by a senior official may also be a problem in single-officer posts.

Consular posts send a few hundred cases a year presenting significant legal issues to the Visa Office of the State Department for an advisory opinion that is binding only with respect to legal issues. The applicant typically has no notice of this proceeding. Such review affects the results in only a small number of cases, since most visa denials are based on a factual determination.

Current law has been read by some to limit both administrative and judicial review. Section 104(a) of the INA, 8 U.S.C. §1104(a), excepts the Secretary of State from the administration or enforcement of "those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas." This language has been

considered by some to preclude the establishment of a more formal review mechanism within the State Department. Further, courts have generally limited the extent of available judicial review.

The Conference believes that it is important that there be at least some level of review of consular discretion to deny or grant visas. The availability of such review would not only encourage consistency and care in the initial adjudication, but would serve interests of fairness and legitimacy. On the other hand, a review scheme in this area can be crafted in a fashion that keeps procedure to a minimum, takes account of the extremely high volume of visa applications, and avoids over-judicialization of the process.

The Recommendation reflects a two-pronged approach to administrative review of visa denials, aimed both at improving the review at the consular level and at considering the creation of a level of centralized administrative review. The suggestions directed at the consular offices are intended to encourage quick, consistently applied, and cost-effective review that would resolve many of the issues on which review might be requested. The Recommendation also asks the State Department to study the issues, and develop and submit to Congress a proposed process for administrative review of consular actions. The Conference recognizes that there are currently competing priorities for resources that might be required by implementation of this Recommendation, but believes that these proposals should be implemented as quickly as is feasible under the circumstances.

RECOMMENDATION

1. The State Department should adopt a regulation ensuring that applicants may be accompanied by an attorney or other authorized representative during the course of the visa application interview process. To the extent practicable, the State Department should take steps to reply promptly to communications from applicants or authorized representatives and to ensure that facilities are available to enable applicants to meet with their representatives during the application interview process.

2. The State Department should require consular officers to provide brief but explicit written statements of the factual and legal bases and reasons for denying a visa application, except where reasons of national security or potential adverse effects on foreign policy dictate otherwise.

3. The State Department should modify its regulations to allow Visa Office advisory opinions to be made available to applicants and their authorized representatives except where national security or potential adverse effects on foreign policy dictate otherwise.

4. The State Department should either comply with its regulation found at 22 CFR §41.121(c) requiring review within a consulate of each

denial of a visa application, or examine alternative systems to review visa denials at consular posts. In such a study, the State Department should keep in mind the goal of ensuring consistency in visa adjudications and consider possible alternatives to address exigencies created by busy consular posts, for example, by reviewing random samples of visa denials, or selecting for review certain types of denials.

5. The State Department should, after appropriate study, develop and submit for Congressional review a proposed process for administrative review of consular visa actions.¹



Former Conference Vice Chairman James Miller III and Professor Emeritus Kenneth Culp Davis discussing recommendations at the December plenary reception.

1. If it is thought that current law precludes such a State Department study, Congress should authorize the State Department to undertake the study.

Recommendation 89-10:
Improved Use of Medical Personnel in Social Security
Disability Determinations (*Adopted December 15, 1989*)

The Social Security Administration annually processes more than 1.5 million requests for Disability Insurance Benefits and Supplemental Security Income requiring a determination whether the claimant is disabled. The Administrative Conference has addressed various aspects of the Social Security Administration's administrative procedures in earlier recommendations.¹ This recommendation focuses more specifically on the appropriate use of medical personnel in making disability determinations.

The Social Security Administration (SSA) uses medical personnel currently in two ways. First, initial and reconsideration determinations are made for SSA by federally funded state agencies which use teams composed of one lay disability examiner and one medical doctor or psychologist.² Second, medical sources are used to provide evidence of disability in individual cases and to explain or elaborate upon medical evidence obtained from other sources. Medical sources provide evidence relating to individual claims to state agencies at the initial decision and reconsideration levels, to administrative law judges at the hearing level, and to the Appeals Council. Requests can be made to the claimant's treating physician or to an independent physician who is asked to examine the claimant and report on his or her findings. Doctors are asked by some administrative law judges to explain or elaborate upon existing medical evidence; other administrative law judges and most state agency personnel do not use independent medical doctors for these purposes. Medical personnel are involved in the disability determination process for other federal disability programs as well. Although the extent to which they are used varies from program to program, programs typically concentrate the use of medical personnel at the initial decision stage, as does the Social Security Administration.³

There is no doubt that medical personnel can offer valuable assistance in making disability determinations called for by the Social Security Act. Notwithstanding the mixed medical and legal content of the Social Security Act's disability standards, most disability determinations require the resolution of medical issues in one form or another. At the same time, it must be recognized that doctors cannot simply apply their general medical expertise to the work of determining disability under a complex and multi-faceted statutory disability standard. Doctors are accustomed to evaluating a person's limitations in the context of treatment; they are oriented professionally to identify the cause of and resolve limitations, rather than to identify limitations and then measure them against stated requirements for receipt of benefits. These recommendations are intended to help reconcile the needs of the Social Security

Administration disability determination process for medical expertise and the ability of the medical profession to meet those needs.

Medical personnel perform three main functions in current practice. First, they assist in developing the medical records on which disability decisions are based. Second, they provide medical evidence for the record, including medical findings and opinions relating to an individual claimant's impairments and explanations of other medical evidence already in the record. Third, they participate in making disability decisions at the initial and reconsideration levels based on the record.

Each of these functions suggests models for using medical decisionmakers in Social Security disability determinations. The first model would increase the responsibility of medical personnel for compiling all relevant medical evidence. Medical personnel would concentrate on evaluating the adequacy of the record and following up with requests for clarification and additional information from treating and consulting medical sources. Medical personnel would also be given specific responsibility for assuring that all medical evidence in the record is clear and understandable to both medical and non-medical decisionmakers. The second model would improve the use of doctors as sources for supplying medical data and opinions on which disability decisions can be based. This model also supports the use of medical personnel to evaluate and resolve certain specified medical issues relevant to a claim if, in a particular case, there are medical issues that can be identified as appropriate for separate decision. The third model would make more effective use of medical personnel in a decisionmaking role. This model would concentrate medical resources at the initial decision level, where a doctor would share the responsibility for decisionmaking with a non-medical disability examiner. The doctor member of the team would be given special responsibility for certain tasks, and would undertake a full and independent review of the entire record in each case. The expectation is that through open exchange of information between the two decisionmakers and a reasonable allocation of responsibility based on each member's expertise, most disability determinations will be made by consensus. If conflicts arise on medical issues, separate medical personnel would be given the authority to resolve those conflicts.

The following recommendations would implement the important provisions of each of these models. Implementing these recommendations would require greater expenditures for medical personnel and related support at the state agencies. However, additional costs should be offset by savings resulting from elimination of the reconsideration level and reduced numbers of administrative and federal court appeals.

RECOMMENDATION

A. Improvements at the Initial Decision Level

The Social Security Administration (SSA) should enhance the

decisionmaking role of medical personnel at the initial decision level. This can be accomplished by improving upon the current practice of using two-member teams--consisting of a medical member who is a licensed physician or psychologist and a non-medical member who is a disability examiner--to determine disability, as follows:

1. *Responsibility for developing medical evidence.* SSA should ensure that the medical member of the team is given primary responsibility for developing the medical evidence⁴ in the record.

(a) Staff and resources should be allocated so as to assure that a complete record of all evidence relevant to a disability claim is obtained before an initial decision is made on the claim.

(b) Specially trained support staff, including nurses and non-medical personnel, should be made available to assist the medical member in developing the medical evidence.

(c) The medical member should, whenever possible, be assigned direct responsibility for evaluating the adequacy of reports from physicians and for following up with requests for clarification or additional information from these sources.

2. *Identifying and deciding discrete medical issues.* SSA should develop a list of discrete issues raised by the applicable disability standards that may arise in individual claims and that are appropriate for decision by medical staff. The medical member of the team assigned to a claim should be made responsible for identifying any such discrete issues raised in the claim, developing all evidence relevant to the issue, and reaching a decision on that issue.

3. *Resolving medical conflicts.* SSA should ensure that medical personnel are used to resolve any conflicts on medical issues that arise in the course of team evaluations of disability at the initial decision level.

(a) Senior medical staff should be given the authority to review claims where the team members are unable to agree and to recommend further action, including the development of additional medical evidence, in order to resolve the conflict.

(b) If the conflict persists, the state agency's medical personnel should assume primary responsibility for evaluating the record with respect to the medical issues and for making a determination based on that record.

(c) As part of this process, independent medical experts, or panels of experts, should be identified and retained for use as examining and non-examining consultants, as appropriate.

4. *Notice of deficiencies in medical evidence.* SSA should require that claimants be informed specifically of any deficiencies in the medical evidence that could lead to an adverse determination before the initial decision is made.

(a) This notice should be prepared by the medical member of the team, should clearly explain any deficiency in the medical evidence, and should encourage the claimant to provide additional

information and explanation, as needed. This notice should also state that the agency will assist claimants in obtaining this information when they are unable to do so on their own due to financial or other constraints.

(b) As part of this process, either the claimant or the medical member should have the authority to initiate a face-to-face interview.

5. *Ensuring quality of evidence.* SSA should take steps to improve the quality of evidence provided by medical sources for disability adjudications.

(a) Guidelines should be established which identify priorities for the use of treating physicians, examining physicians and non-examining physicians, including specialists, for these purposes.

(b) Selection and evaluation of physicians asked to provide medical information should be performed by medical personnel independent from the agency staff responsible for making disability decisions and should be supported by a system for quality control covering both the selection of physicians and the reports submitted.

(c) Physicians asked to provide medical information should be adequately compensated and should be provided with instructions as to applicable agency standards.

(d) Medical personnel should be able, when appropriate, to consult with specialists before ordering examinations or tests.

(e) All contacts with medical sources relating to the determination of disability for a particular claim should be documented routinely in writing and included in the record. SSA should ensure that claimants are provided a copy of any reports prior to issuance of the decision and accorded an opportunity to object and rebut appropriately.

6. *Training and supervision of medical personnel.* SSA should ensure that all medical personnel are trained fully on legal and program issues, and work under the supervision of the chief medical officer in the state agency. SSA should also ensure that medical staff act in accordance with the rules established by the Social Security Act and relevant federal court decisions, including the requirement to obtain and give appropriate weight to the opinions of claimants' treating physicians, in performing the functions described in paragraphs 2, 3(b), and 5(a).

B. Reconsideration

7. *Elimination of Reconsideration.* SSA should seek to concentrate the efforts of the disability determination team on a single initial decision process, as outlined in these recommendations. Together with implementation of these recommendations, the separate reconsideration stage should be eliminated.

C. Appeal Level

8. *ALJ use of medical experts.* SSA should encourage its administrative law judges to call on an independent medical expert in appropriate cases to assess the need for any additional medical evidence and to explain or clarify medical evidence in the record.⁵ SSA should make clear by regulation that a medical expert's evidence can be presented orally or in writing. The regulations should also provide that claimants are notified of the inclusion of an expert's report in the record and should assure that claimants' rights to object to the inclusion of the report, submit rebuttal evidence, and cross-examine the expert are not abridged. The regulations should also provide that all information and opinions provided by medical experts must be included in the record.

1. See Recommendations 78-2 (ALJ hearing stage), 87-6 (state level determinations), 87-7 (Appeals Council).

2. For cases involving mental impairments, Social Security regulations provide that either psychologists or psychiatrists may assist in determining disability. Accordingly, references to the terms "medical sources," "physicians," and "doctors" in these recommendations are intended to include psychologists used in those cases.

3. While the Conference has examined the other federal disability programs and believes that these recommendations hold valuable lessons for the agencies administering those programs, these recommendations are addressed solely to the Social Security Administration.

4. "Medical evidence" includes (1) medical findings and opinions relating to an individual claimant's impairments, (2) other evidence, including subjective symptoms, that is relevant to determining the existence or severity of the claimant's condition, and (3) explanations of other medical evidence already in the record. The recommendations' focus on development of medical evidence is not intended to minimize the importance of the development of other evidence, including vocational evidence.

5. SSA should also ensure that its ALJs receive appropriate training on medical issues relevant to their decisional responsibilities.

Statement 14:

Mass Decisionmaking Programs: The Alien Legalization Experience *(Adopted June 16, 1989)*

The Alien Legalization Program, authorized under the Immigration Reform and Control Act of 1986, created a program to allow certain aliens present illegally in the United States to convert their status to that of a legal resident. The program is administered by the Immigration and Naturalization Service and has a short and defined lifetime, which is heading toward completion. The legalization program contains two separate pieces: the "section 245A" program, for aliens who have been in the country since January 1, 1982; and the "special agricultural worker" program, for alien farmworkers who worked in specified agricultural employment for at least 90 days during a specified period. The application period for the "section 245A" program ran from May 5, 1987 through May 4, 1988. The application for the SAW program ran from June 1, 1987 through November 30, 1988. Although the INS has acted on most of the cases, some are likely to remain pending for months. Moreover, as described below, the second phase of the process is still ongoing.

The Administrative Conference has studied the INS's processing of alien legalization applications from the standpoints of what improvements can be made by the INS in the remaining phases of the legalization program itself, and what lessons can be applied in future mass decisionmaking programs by the INS or by other agencies. This Statement does not address the merits of litigation over the regulatory ground rules of the program, but only the procedures for handling the applications themselves.

DESCRIPTION OF THE PROCESS

The Alien Legalization Program has been administered by the INS using a framework of local Legalization Offices (LOs) (107 of them across the country) and four Regional Processing Facilities (RPFs) to process the more than three million applications for legalization that were received. Applications are filed with the LOs, where interviews are conducted and recommendations for action are made. The files are then sent to a central processing center in London, Kentucky, following which they are forwarded to one of the four RPFs across the country. The RPFs make the determinations on the applications, based on the file material. Appeal of a denial of legalization status is available to the Legalization Appeals Unit (LAU) in Washington, D.C., and is based on the "administrative record." 8 U.S.C. §1255a(f)(3)(B).

The legalization process has two phases. The first phase is to determine whether an applicant qualifies for legalization. The second

phase, which applies only to qualified section 245A applicants, involves a determination whether they qualify for permanent resident alien status. (In the agricultural program, permanent resident alien status is automatic.) The initial application period for both programs is now closed, and the INS has processed a large number, although not all, of those applications.

The "remote decisionmaking" system employed in the Alien Legalization Program involves decisionmaking at the four RPFs rather than at local levels. This system has provided more consistency in decisions than other, more decentralized systems within the INS. Having the determination made by a person removed from the individual who actually interviewed the applicant reduced the potential subjectivity of decisionmakers. Because interviewers at the local levels knew that their files would be examined in virtually every case, the quality of work in the files has been relatively high. There are also suggestions that the system of regional facilities promoted cost-efficiency.

The RPF remote decisionmaking system, however, has not been without problems. The elimination of direct contact between the decisionmaker and the applicant, which helps eliminate bias or prejudice, also eliminates the opportunity for first-hand credibility determinations by the ultimate decisionmaker. The RPFs also have been very isolated from the public, making it difficult for applicants or their representatives to acquire information about the status of cases, among other things. The RPFs have had only limited access to legal advice from INS attorneys, requiring them in at least one facility to seek advice from the LAU, which is the appellate unit that reviews appeals of their decisions. There have been some difficulties relating to the interaction between the LOs and the RPFs, and relating to the provision of adequate notice to applicants at different stages of the program. There also has been reported an unexpectedly high incidence of fraudulent applications, particularly in the agricultural worker program, which the RPFs were not equipped to handle.

Overall, however, the system for deciding legalization applications appears to be working fairly well. The results among the regions have been quite consistent so far. The INS has been able to process large numbers of the applications, particularly in the first phase of the section 245A program. Moreover, the INS has recognized many of the problems, and taken steps to address them.

From the INS experience, it is possible to derive some lessons, not only for other INS programs in the future, but for other agencies that may consider using a system of remote decisionmaking for a large volume of cases. There are also a number of lessons that can be drawn about the Alien Legalization Program in particular. While that program is nearing completion, to the extent that these comments refer to elements of the program that are ongoing, the Conference encourages the INS to implement the suggestions to the extent possible and to the extent that it has not already done so.

CONCLUSIONS

A. The Conference encourages agencies, including the INS, to consider using remote decisionmaking where there is a large volume of cases to be decided on the basis of objectively verifiable information within a written file, particularly where bias, prejudice or other subjectivity may be a significant problem. This system appears to promote consistency among decisionmakers, perhaps because of the more centralized nature of the process, and the fact that it is easier for a small group of managers to confer on a regular basis about the decisionmaking process. Agencies should, in implementing such a system, consider the following suggestions:

1. In a remote decisionmaking system in which a file prepared on a local level will be the basis for decisionmaking, there must be clear guidelines as to what are the necessary contents of the file, and the use of standardized forms and checklists is encouraged.

2. Where the local office is making a preliminary recommendation to the remote decisionmaking center, the local office should be instructed to provide an explanation for its recommended decision that is sufficient to provide the remote center with the maximum benefit of the local office's information and interaction with the applicant or other interested person whose case is being determined (hereinafter "applicant"). Appropriate forms or formats (e.g., computer entry) should be designed to ensure that the necessary information is transmitted in a uniform manner to assist in review and retrieval.

3. It is important that adequate information be available to the applicants and their representatives concerning their cases. To facilitate this, case tracking systems capable of responding to inquiries should be developed. Applicants should be clearly informed of the process relating to their cases, and be given adequate notice of each step that requires or provides an opportunity for action or participation on their part.

4. To avoid the appearance or actuality of conflict, it is important that the remote decisionmaking centers have adequate access to legal advice relating to the merits of matters before them from agency legal staff other than from the appellate unit, if any, that reviews appeals of their decisions.

5. Ensuring input from local personnel on credibility issues is of particular importance. It may be useful to consider ways of videotaping or otherwise recording interviews where the applicant's credibility is at issue.

6. Where helpful, the decisionmakers at remote decisionmaking centers should be provided the opportunity to work for a short period of time at a local office, giving them first-hand experience in interviewing applicants, in order to provide them a better sense of the implications of the information they receive.

7. The remote decisionmaking centers' managers should consult with each other regularly on substantive and procedural matters, in order to ensure that their actions are consistent.

8. It is important that the system be able to provide new or amended instructions to the local offices quickly, so that consistency can be maintained and the benefits of experience transmitted.

B. With respect to the Alien Legalization Program specifically, the Conference encourages the INS to implement or continue to implement the following suggestions to the extent that they refer to elements of the program that are ongoing:

1. Action should be taken to ensure that information concerning individual applications for legalization is readily available to the applicant or his or her representative. INS should:

a) Establish a method of tracking cases that would enable applicants or their representatives to obtain information expeditiously concerning the status of their cases;

b) Ensure that applicants are clearly informed concerning all of the steps required to complete the legalization process, both initially and as actions are taken on their applications, particularly where further action on their part may be called for;

c) Recognize the need to extend completion times where applicants are unable to fulfill educational requirements due to a shortage of educational facilities or programs;

d) Supplement existing mail communication with applicants, including through the use of broadcast media. Particular attention should be paid to the mobility of many applicants, as well as to the fact that applicants have not always understood the multiple-step nature of the process, and thus have not realized that INS may be seeking to communicate with them.

2. INS should ensure that RPFs have sufficient access to legal advice from INS attorneys; however, the RPFs should not seek legal advice from the Legalization Appeals Unit (LAU), the office that reviews appeals of RPF decisions.

3. INS should consider making the following modifications in the way applications are processed by the Legalization Offices (LOs) and RPFs:

a) Including in the recommendation forms used by the LOs an additional option, "recommended scrutiny", in order to assure that the RPF reviews the application, without having to recommend denial for lack of another option.

b) Arranging for the following in cases where fraud is suspected:

i) reinterviewing applicants whose cases have not been decided; in the case of SAW applicants, such interviews should be done by specially-trained decisionmakers with knowledge of agriculture.

ii) using video cameras to tape remaining interviews, in order to have a record on which credibility can be better assessed.

iii) assigning remaining cases at the RPFs to specially trained teams of decisionmakers; in the case of SAW applicants, such decision-makers should be trained to review agricultural cases and the types of fraud that may appear in such cases.

c) Considering whether LO personnel should have more direct impact on legalization decisions, since they are the ones who actually have the opportunity to assess the credibility of applicants.



Chairman Marshall Breger and Secretary of Transportation Samuel Skinner preparing to address the membership at the plenary reception in December.

Statement 15:

Procedures for Resolving Federal Personnel Disputes

(Adopted December 14, 1989)

In 1978, Congress enacted the most comprehensive revision of the federal civil service laws since the Pendleton Act of 1883. The Civil Service Reform Act (CSRA) of 1978 created new institutions and processes for personnel management, including a substantially restructured system for considering complaints, grievances and appeals filed by federal employees in response to personnel actions.¹ Personnel disputes typically involve such matters as removals from the service, reductions in pay or grade, suspensions, furloughs, promotion and award decisions, and reductions-in-force.

Congress' 1978 revision of the framework for considering employee complaints, grievances and appeals was in part prompted by the confusing, complex and time-consuming nature of the existing procedures. Moreover, the procedures were seen as intimidating to both managers and employees and, therefore, likely to deter managers from taking appropriate personnel action and to discourage employees from pursuing available avenues to vindicate their rights. There was also a perception that the Civil Service Commission was unsympathetic to employee discrimination cases and to unions.

The statutory framework created in 1978, with its new forums for adjudicating employee claims, was no less complex and has continued to produce costs, delays, and confusion, accompanied by substantial resource commitments. Close scrutiny discloses that this complexity was in large part created by the tension inherent in the simultaneous pursuit of three important legislative goals: adequate protection of employees from discrimination;² uniformity in federal personnel management; and solidification and expansion of the place of arbitration as a mechanism to resolve federal employee grievances.

As a general principle, procedures for handling federal employee disputes should be as simple and fair as feasible. Fairness must include a concern for the timely, final resolution of claims. At the same time, however desirable procedural simplification may be, federal employees and managers alike should have confidence in the processes for adjudicating personnel disputes. This is especially true when a federal employee contests a personnel action on the grounds of discrimination, since nothing is more basic than the right to be free of invidious discrimination.

To address these matters, the Administrative Conference commissioned a consultant's report.³ The report describes the historical background to the 1978 reforms, along with the institutional and procedural framework created by the CSRA. It examines the operation of the

system and makes specific recommendations for legislative and administrative changes. The Conference's Committee on Governmental Processes has held numerous meetings to consider the report, has provided opportunity for public participation in those meetings, and has invited public comment on various procedural changes that might be recommended.

This process has demonstrated the continuing importance of employee and management concerns in addressing the procedural questions that are the subject of the study. The intricate web of processes, consciously designed by Congress in its enactment of the CSRA, resulted in part from substantive policy and value judgments that transcend the domain of administrative procedure. The complex framework has been perceived by employees and their representatives as providing necessary protection against possible arbitrary employer action, particularly in cases where discrimination is alleged. As a result, employees may perceive proposed procedural simplification as a potential threat to substantive rights.

For this reason, whether to retain or modify the present procedures must be resolved largely through the legislative process. The experience of the past decade, as described in the consultant's report, has persuaded the Administrative Conference that the time is ripe for fresh consideration by Congress of the problems that gave rise to the CSRA and to the issues that have developed subsequently. In fact, Congress has started to re-examine selected aspects of the system, including equal employment opportunity. In addition, the EEOC has issued a notice of proposed rulemaking to change substantially the federal sector discrimination complaint process.⁴

This Statement describes certain important issues that we believe should be addressed as part of a comprehensive congressional review of the CSRA processes. These include:

- (i) whether there should be one rather than the present two opportunities for a full scale trial-type proceeding in cases raising claims of discrimination;

- (ii) whether to retain the existing complex structure for administrative adjudication of "mixed" cases, i.e., those in which the employee alleges that unlawful discrimination was the basis for an adverse personnel action;

- (iii) whether the government should have the right to appeal to the courts in cases involving claims of discrimination;

- (iv) whether employees or their unions should be permitted to seek judicial enforcement of arbitral awards; and

- (v) whether the functioning of existing adjudicatory frameworks --grievance systems of individual agencies, agency complaint processes for discrimination cases, the MSPB process and the various negotiated grievance processes--could and should be improved.

These questions cannot and should not be examined in isolation, as any review of the procedures of the CSRA should recognize the integrated nature of the complex processes of the Act. Whether or not congressional re-examination takes place, this Statement also suggests that the Office of Personnel Management and agencies scrutinize and, where appropriate, seek ways to improve the patterns of communication within agencies and to employees regarding the workings of the complaint, grievance and appeal system. The Conference encourages the creative use of alternative means of dispute resolution in resolving employee claims.⁵

A. Need for Comprehensive Overview.

In considering the issues posed below, Congress should take into account the fact that the intricate federal personnel scheme consists of numerous interrelated processes and institutions. Accordingly, statutory changes should be enacted only after careful consideration of their potential direct and indirect consequences throughout the system for resolving employee complaints, grievances and appeals.

B. Cases Raising Claims of Discrimination.

1. *The Number of Hearings in Mixed Cases.* "Mixed" cases are controversies involving personnel actions appealable to the MSPB, where an employee alleges that unlawful discrimination was a basis for the agency's action. These cases are "mixed" in that they involve issues both of civil service law and employment discrimination. Under present law federal employees, unlike employees in the private sector, on allegations of employment discrimination in such cases, have a right to a full trial-type administrative hearing (at the MSPB) and, if unsuccessful, may obtain a second *de novo* adjudicatory hearing in United States District Court. The question for congressional consideration is whether an employee who has chosen a trial-type administrative hearing in a mixed case, and has then been afforded the opportunity for a full evidentiary hearing on the record on all relevant matters, should be entitled to a judicial trial *de novo* or should be limited to judicial review in a court of appeals on the administrative record under the substantial evidence test -- the customary venue and scope of review of formal administrative adjudications.

2. *The Process for Deciding Mixed Cases.* The statutory procedure for mixed cases provides the opportunity for sequential consideration by the MSPB and the EEOC, with the possibility of further proceedings before a Special Panel consisting of one member of the MSPB, one member of the EEOC, and a chairman appointed by the President for a term of six years with the advice and consent of the Senate. Through these provisions, the CSRA embodies Congress' effort to bring to bear both the MSPB's expertise in general issues of personnel law and the EEOC's expertise with discrimination issues. This complex

procedure is intended to achieve a balanced use of both agencies' expertise.

In most mixed cases presented to the EEOC, the Commission has accepted the MSPB decision and, where it has not, the MSPB has generally deferred to the Commission's disposition of these cases. During the first ten years of the CSRA, there have been only three Special Panel proceedings, indicating that the two agencies have failed to reach an accommodation in only a very limited number of cases. Even where a Special Panel was unnecessary, however, sequential consideration by the MSPB and the EEOC has required significant time and effort and has at times led to confusion on the part of agencies and claimants. The question for congressional consideration is whether experience confirms the desirability of dual agency participation in mixed cases or whether that experience suggests that consistently fair and more timely results may be achieved through a less complex process.

3. *Government's Right to Appeal.* Under existing law the government may petition for judicial review of certain administrative and arbitral decisions in personnel cases that present significant issues of civil service law. The availability of such review is either uncertain or non-existent when those decisions implicate issues of discrimination law.⁶ There is disagreement over the desirability of permitting the government to seek a judicial resolution of legal issues that have been decided adversely to the government at the administrative level.

The question for congressional consideration is whether in the interest of consistency the government should have the right to judicial review (or at least the authority to petition for it) in cases where the Director of OPM determines that an administrative or arbitral decision constitutes an incorrect interpretation of civil service or discrimination law that may have a substantial impact. The primary countervailing considerations are the increased potential for further delay in final resolution of such cases and whether the executive branch should be authorized to seek judicial resolution of disputes between two of its agencies, as would be the case if OPM were permitted to appeal from adverse determinations of the EEOC.

C. Enforcement of Arbitration Awards.

Although federal employee grievance arbitration awards are intended to be binding, federal agencies do not always comply with them. Under the CSRA, the only mechanism available to a federal employee seeking to enforce an arbitral award is an unfair labor practice proceeding before the FLRA. Such a proceeding requires filing of a complaint by the Authority's General Counsel and a hearing before the FLRA, followed by judicial review and enforcement of the resulting FLRA order. There is substantial dispute over the question whether an employing agency may raise any defense to an enforcement action other than compliance with the arbitral award.

Questions for congressional consideration include whether to permit an employee or union to seek direct judicial enforcement of federal sector grievance arbitration awards, where such enforcement should take place, and what issues should be open for litigation in the chosen forum. A central issue is whether permitting such direct enforcement actions would increase or decrease the likelihood of voluntary agency compliance with arbitration awards.

D. Need to Examine Existing Adjudicatory Systems.

1. *Agency Administrative Grievance Systems.* Agency administrative grievance systems have taken on increasing importance as the only avenue of redress⁷ available to an individual employee in cases not falling within MSPB or EEOC jurisdiction or within the scope of a negotiated grievance procedure. The Office of Personnel Management and other agencies should ensure that these systems in fact provide fair, efficient, and timely resolution of workplace disputes, and further studies of the structure and usage of these systems may be needed.⁸ In reviewing these processes, agencies should give careful consideration to alternative means of dispute resolution.

2. *Agency Complaint Processes in Discrimination Cases.* Over the years, criticism has been leveled at the quality and timeliness of agency disposition of discrimination complaints. The EEOC and individual employing agencies should continue to take steps to ensure adequate and expeditious investigation and timely, final resolution of such claims. Experimentation with, and incorporation of, alternative dispute resolution techniques may be useful.

3. *MSPB and Negotiated Grievance Systems.* The MSPB process and the various negotiated grievance processes dispose of large numbers of significant employee claims. Concerns have been expressed regarding certain aspects of their operation, including the familiarity of arbitrators with federal personnel law and the need for increasing the statutory independence of the MSPB's administrative judges. These concerns may warrant further study.

E. Better Communication Within Agencies and to Employees.

Multiple avenues for relief present the danger of parallel, duplicative proceedings. Agencies should take steps to ensure that there are consistent patterns of communication among their personnel, labor relations and equal employment opportunity staffs to reduce the likelihood of parallel, duplicative proceedings in personnel actions for which such duplication is not permitted by law.

To use the personnel grievance system effectively, employees must have clear and reliable information about options available to them and the consequences of choosing one route over another. The Office of Personnel Management and other agencies should ensure that there exist readily available and easily understandable written or other mate-

rials that inform federal employees of their complaint, grievance and appeal options and the consequences of their choice of one complaint, grievance or appellate route over another.

Five institutions share in the administration of the CSRA:

1. Office of Personnel Management (OPM), which is vested with the general authority to execute, administer and enforce the laws and rules governing the civil service except with respect to those functions vested in other agencies;

2. Merit Systems Protection Board (MSPB), which is an independent adjudicatory body charged with hearing and deciding employee appeals from agency personnel actions of various kinds including major performance and disciplinary actions;

3. Office of the Special Counsel (OSC), which is charged with the investigation and prosecution before the MSPB of requests for corrective and disciplinary action when prohibited personnel practices have allegedly occurred;

4. Equal Employment Opportunity Commission (EEOC), which enforces various anti-discrimination statutes as they apply to both public and private employment, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Rehabilitation Act; and

5. Federal Labor Relations Authority (FLRA), which is an independent agency charged with hearing and deciding complaints of unfair labor practices and reviewing arbitration awards on matters falling within the scope of negotiated grievance procedures established by collective bargaining agreements.

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1. Office of Personnel Management (OPM), which is vested with the general authority to execute, administer and enforce the laws and rules governing the civil service service except with respect to those functions vested in other agencies;

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4. Equal Employment Opportunity Commission (EEOC), which enforces various anti-discrimination statutes as they apply to both public and private employment, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Rehabilitation Act; and



Consultant David Martin and Rulemaking Committee Chairman Ernest Gellhorn responding to question from Judge Stephen Breyer.

5. Federal Labor Relations Authority (FLRA), which is an independent agency charged with hearing and deciding complaints of unfair labor practices and reviewing arbitration awards on matters falling within the scope of negotiated grievance procedures established by collective bargaining agreements.

2. "Discrimination" refers to discrimination on the basis of race, color, religion, sex, national origin, age, and handicapping condition.

3. William V. Luneburg, *The Federal Personnel Complaint, Appeal, and Grievance Systems: A Structural Overview and Proposed Revisions*, 78 Ky. L. J. 1 (1989).

4. See "Federal Sector Equal Employment Opportunity" (29 CFR Part 1614), 54 Fed. Reg. 45747 (October 31, 1989).

5. See Recommendation 86-3, Agencies' Use of Alternative Means of Dispute Resolution, 1 CFR §305.86-3.

6. See, e.g., *Moore v. Devine*, 780 F.2d 1559 (11th Cir. 1986).

7. See, e.g., *Harrison v. Bowen*, 815 F.2d 1505 (D.C. Cir. 1987).

8. OPM has recently reviewed the systems established by agencies and has published a study entitled *A Survey of Agency Administrative Grievance Systems* (June 1989).

APPENDIX F - CONFERENCE PUBLICATIONS

The following materials published by the Office of the Chairman are sold by the U.S. Government Printing Office. Call (202)783-3238 to reach the order desk at the Government Printing Office. Orders may be charged to VISA, Master Charge or GPO Deposit Account.

SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION, available from the Government Printing Office (Stock Number 052-003-01070-4) for \$31.00, was produced in 1987. This volume includes information on ADR in general, specific dispute resolution techniques, federal agency policies and practices, various forms and procedures, and implementation considerations.

AGENCY ARBITRATION, CONSTITUTIONAL AND STATUTORY ISSUES, Studies in Administrative Law and Procedure 88-1, available from the Government Printing Office (Stock Number 052-003-01135-2) for \$5.50. It contains reports by Harold H. Bruff and Richard K. Berg; the text of Recommendations 86-3 and 87-5; the text of S. 2274; and Chairman Breger's testimony before the House Judiciary Committee; and a copy of a brochure describing the Conference's role with ADR.

Reprints of an indexed bibliography [*Administrative Conference of the United States: A Bibliography 1968-1986*, 39 ADMINISTRATIVE LAW REVIEW 245 (Spring 1987)] are available upon request from the Office of the Chairman. The following list includes agency sponsored reports and articles printed during 1989.

ADMINISTRATIVE CONFERENCE OF THE U.S. (OFFICE OF THE CHAIRMAN), MULTI-MEMBER INDEPENDENT REGULATORY AGENCIES, A PRELIMINARY SURVEY OF THEIR ORGANIZATION (1989).

Anthony, Robert, *Which Agency Interpretations Should Bind the Courts and the Public?* 1989 ACUS xxx.

Recommendation 89-5: "Achieving Judicial Acceptance of Agency Statutory Interpretations," 1 CFR §305.89-5.

Bednar, Richard J., *Government Contracting Officers Should Make Greater Use of ADR Techniques in Resolving Contract Disputes*, 1989 ACUS xxx.

Recommendation 89-2: "Contracting Officers' Management of Disputes," 1 CFR §305.89-2.

Berg, Richard K., *Conflict-of-Interest for Members of Federal Advisory Committees*, 1989 ACUS xxx.

Recommendation 89-3: "Conflict-of-Interest Requirements for Federal Advisory Committees," 1 CFR §305.89-3.

Bloch, Frank S., *The Use of Medical Personnel in Social Security Disability Determinations*, 1989 ACUS xxx.

Recommendation 89-10: "Improved Use of Medical Personnel in Social Security Disability Determinations," 1 CFR §305.89-10.

Edles, Gary, *The Administrative Conference: Entering a Third Decade of Practical Scholarship*, 41 AD. L. REV. 399 (1989).

Estreicher, Samuel and Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L. J. 679 (1989).

Gilhooley, Margaret, *The Availability of Decisions and Precedents in Agency Adjudications: The Impact of the Freedom of Information Act Publication Requirements*, 3 ADMIN. L. J. 53 (1989), 1989 ACUS xxx.

Recommendation 89-8: "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," 1 CFR §305.89-8.

Harter, Philip J., *Neither Cop nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 AD. L. REV. 315 (1989); 1988 ACUS 839.

Recommendation 88-11: "Encouraging Settlements by Ensuring Mediator Confidentiality," 1 CFR §305.88-11.

Harter, Philip J., *Standards of Conduct for Presidential Transition Workers*, 1988 ACUS 77; *Proposed Standards of Conduct For Presidential Transition Workers*, 36 FED. BAR NEWS & J. 130 (1989).

Recommendation 88-1: "Presidential Transition Workers' Code of Ethical Conduct," 1 CFR §305.88-1.

Jost, Timothy Stolfus, *Administrative Law Issues Involving the Medicare Utilization and Quality Control Peer Review Organization (PRO) Program: Analysis and Recommendations*, 50 OHIO ST. L. J. 1 (1989), 1989 ACUS xxx.

Recommendation 89-1: "Peer Review and Sanctions in the Medicare Program," 1 CFR §305.89-1.

Kutten, L.J. and Brian C. Murphy, *AN OVERVIEW OF U.S. EXPORT CONTROLS* (1989).

Lunenburg, William V., *The Federal Personnel Complaint, Appeal, and Grievance Systems: A Structural Overview and Proposed Revisions*, 1989 ACUS xxx.

Statement 15: "Procedures for Resolving Federal Personnel Disputes," 1 CFR §310.15.

Martin, David A., *Reforming Asylum Adjudication*, 1989 ACUS xxx.

Recommendation 89-4: "Asylum Adjudication Procedures," 1 CFR §305.89-4.

Morgan, Thomas D., *Public Financial Disclosure by Federal Officials: A Functional Approach*, 3 GEO. J. OF LEG. ETH., 1989 ACUS xxx.

Recommendation 89-6: "Public Financial Disclosure by Executive Branch Officials," 1 CFR §305.89-6.

Nafziger, James A. R., *Report on Reviewability of Visa Denials by Consular Officers*, 1989 ACUS xxx.

Recommendation 89-9: "Processing and Review of Visa Denials," 1 CFR §305.89-9.

North, David S. and Portz, Anna Mary, *Decision Factories: The Role of the Regional Processing Facilities in the Alien Legalization Programs*, 1989 ACUS xxx.

Statement 14: "Mass Decisionmaking Programs: The Alien Legalization Experience," 1 CFR §310.14.

Perritt, Henry H., Jr., *Electronic Acquisition and Release of Federal Agency Information: Analysis of Recommendations Adopted by the Administrative Conference of the United States*, 41 AD. L. REV. 315 (1989); 1988 ACUS 601.

Recommendation 88-10: "Federal Agency Use of Computers in Acquiring and Releasing Information," 1 CFR 305.88-10.

Shapiro, Sidney A., *Biotechnology and the Design of Regulation*, 1989 ACUS xxx.

Recommendation 89-7: "Federal Regulation of Biotechnology," 1 CFR §305.89-7.

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Recommendations 87-1 and 87-10, "Priority Setting and Management of Rulemaking by the Occupational Safety and Health

Administration," and "Regulation by the Occupational Safety and Health Administration," 1 CFR §§305.87-1, 305.87-10.

Smith, Stuart A., *Deferred Taxation of Gains Realized Upon Divestiture of Property to Avoid Conflicts of Interest: A Proposal*, 1988 ACUS 273, 36 FED. BAR NEWS & J. 129 (1989)

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Warfield, Wallace, *The Implications of Alternative Dispute Resolution Processes for Decisionmaking in Administrative Disputes*, 16 PEPPERDINE L. REV. S93 (1989).

Wellborn, David M., William Lyons and Larry Thomas, *Implementation and Effects of the Federal Government in the Sunshine Act*, MEZINES, STEIN, GRUFF, ADMINISTRATIVE LAW, New York, Matthew Bender (1986); *The Federal Government in the Sunshine Act and Agency Decision Making*, 20 ADMIN. & SOC'Y. 465 (1989); 1984 ACUS 197.

Recommendation 84-3: "Improvements in the Administration of the Government in the Sunshine Act," 1 CFR §305.84-3.

APPENDIX G - BYLAWS OF THE ADMINISTRATIVE CONFERENCE

TITLE 1, CODE OF FEDERAL REGULATIONS, PART 302*

§302.1 Establishment and Objective

The Administrative Conference Act, 5 U.S.C. 571 *et seq.*, 78 Stat. 615 (1964), authorized the establishment of the Administrative Conference of the United States as a permanent, independent agency of the federal government. The purpose of the Administrative Conference is to improve the administrative procedure of federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest. The Administrative Conference Act provides for the membership, organization, powers, and duties of the Conference.

§302.2 Membership

(a) General

(1) Each member is expected to participate in all respects according to his own views and not necessarily as a representative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(2) Each member is expected to devote personal and conscientious attention to the work of the Conference and to attend plenary sessions and committee meetings regularly. When a member has failed to attend two consecutive Conference functions, either plenary sessions, committee meetings, or both, the Chairman shall inquire into the reasons for the non-attendance. If not satisfied by such reasons, the Chairman shall: (i) in the case of a government member, with the approval of the Council, request the head of the appointing agency to designate a member who is able to devote the necessary attention, or (ii) in the case of a non-government member, with the approval of the Council, terminate the member's appointment, provided that where the Chairman proposes

*As revised June 15, 1989.

to remove a non-government member, the member first shall be entitled to submit a written statement to the Council. The foregoing does not imply that satisfying minimum attendance standards constitutes full discharge of a member's responsibilities, nor does it foreclose action by the Chairman to stimulate the fulfillment of a member's obligations.

(b) Terms of Non-Government Members

Non-government members are appointed by the Chairman with the approval of the Council. One-half of the non-government memberships shall be filled by appointments made on or after July 1 of each year, and each term will expire on June 30 of the second year thereafter. To avoid shortening the term of any non-government member in service as of the effective date of this paragraph, the Chairman shall, by random selection, designate one-half of the non-government members to serve terms terminating on June 30, 1988, and the other half to serve terms terminating on June 30, 1989. No non-government members, other than senior fellows, shall at any time be in continuous service beyond four full terms.

(c) Eligibility and Replacements

(1) A member designated by a federal agency shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he leaves the service of the agency or department. Designations and re-designations of members shall be filed with the Chairman promptly.

(2) A person appointed as a non-government member shall become ineligible to continue in that capacity if he enters full-time government service. In the event a non-government member of the Conference resigns or become ineligible to continue as a member, the appointing authority shall appoint a successor for the remainder of the term.

(d) Alternates

Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, a suitably informed alternate may be permitted, with the approval of a committee, to participate for a member in a meeting of the committee, but such alternate shall not have the privilege of a vote in respect to any action of the committee. Use of an alternate does not lessen the obligation of regular personal attendance set forth in paragraph (a)(2) of this section.

(e) Senior Fellows

The Chairman may, with the approval of the Council, appoint persons who have served as members of the Conference for eight or more years, or former Chairmen of the Conference, to the position of senior fellow. The terms of senior fellows shall terminate at 2-year intervals in even-numbered years. Senior fellows shall have all the privileges of members, but may not vote, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

(f) **Special Counsels**

The Chairman may, with the approval of the Council, appoint persons who do not serve under any of the other official membership designations, to the position of special counsel. Special counsels shall advise and assist the membership in areas of their special expertise. Their terms shall terminate at 2-year intervals in odd-numbered years. Special counsels shall have all the privileges of members, but may not vote, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

§302.3 Committees

The Conference shall have the following standing committees:

1. Committee on Adjudication;
2. Committee on Administration;
3. Committee on Governmental Processes;
4. Committee on Judicial Review;
5. Committee on Regulation; and
6. Committee on Rulemaking.

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

§302.4 Liaison Arrangements

The Chairman may, with the approval of the Council, make liaison arrangements with representatives of the Congress, the judiciary, federal agencies that are not represented on the Conference, and professional associations. Persons appointed under these arrangements shall have all the privileges of members, but may not vote, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

§302.5 Avoidance of Conflicts of Interest

(a) **Disclosure of Interests**

(1) Non-government members (including senior fellows) may be deemed to be special government employees within the meaning of 18 U.S.C. 202 and subject to the provisions of sections 201-224 of title 18 United States Code, in accordance with their terms. The Chairman of the Conference is authorized to prescribe requirements for the filing of statements of employment and financial interests necessary to comply with part III of Executive Order 11,222, as amended, or any successor

presidential or statutory requirement. Without conceding the correctness of the view that non-government members are special government employees, the Conference has chosen to adopt the bylaw provisions that follow in order to eliminate whatever uncertainties might otherwise exist concerning the propriety of participation in Conference proceedings.

(2) In addition to complying with any requirement prescribed by statute or executive order, each member, public or governmental, shall, upon appointment to the Conference and annually thereafter, file a brief general statement describing the nature of his or her practice or affiliations, including, in the case of a member of a partnership, a general statement about the nature of the business or practice of the partnership, to the extent that such business, practice, or affiliations might reasonably be thought to affect the member's judgment on matters with which the Conference is concerned. (For example, a member might state that he or she represents employers or unions before the National Labor Relations Board, broadcasters before the Federal Communications Commission, or consumer groups before agencies and courts.) The Chairman will include with the agenda for each plenary session a statement calling to the attention of the members the requirements of this section. Each member who believes the content of the agenda calls for disclosure additional to that already on file will file an amended statement concerning his or her interests. Current statements of all members will be open to public inspection at the Office of the Chairman and will be readily available at any plenary session. Except as provided in paragraph (b), members may vote or participate in matters before the Conference without additional disclosure of interest.

(b) Disqualifications

(1) In accordance with 18 U.S.C. 208 a member shall not, except as provided in paragraphs (b)(2) or (3) of this section, vote or otherwise participate as a member in the disposition of any particular matter of Conference business, including the adoption of recommendations and other statements, in which, to his or her knowledge, the member has a financial interest. For purposes of this paragraph (b) a member is deemed to have a financial interest in any particular matter in which the member, the member's spouse, minor child, partner, organization in which the member is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he or she is negotiating or has any arrangement concerning prospective employment, has a financial interest.

(2) Notwithstanding paragraph (b)(1) of this section, a member may, at any stage of Conference consideration and without further disclosure, participate and vote on a proposed recommendation or other Conference statement or action relating to the procedure of any federal agency or agencies, where the Conference action is not directed to and is unlikely to affect the substantive outcome of any pending judicial matter

or administrative proceeding involving a specific party or parties (other than the United States) in which to his knowledge he has a financial interest. The Conference determines pursuant to 18 U.S.C. 208(b) that in such a case any financial interest which the member may have in the matter before the Conference is too remote to affect the integrity of the member's service to the Conference.

(3) Where a member believes that he or she is or may be disqualified from participating in the disposition of a matter before the Conference under the provisions of this subsection, the member may advise the Chairman of the reason for his or her possible disqualification, including a full disclosure of the financial interest involved. If the Chairman determines in writing pursuant to 18 U.S.C. 208(b) that the interest is not so substantial as to be likely to affect the integrity of the member's service to the Conference, the member may, upon receipt of such determination, vote and otherwise participate in the disposition of the matter.

§302.6 General

(a) Meetings

All sessions of the Assembly shall be open to the public. Privileges of the floor, however, extend only to members of the Conference, to senior fellows, to liaison representatives, to consultants and staff members insofar as matters on which they have been engaged are under consideration, and to persons who, prior to the commencement of the meeting, have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly.

(b) Quorums

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council.

(c) Separate Statements

(1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation in the FEDERAL REGISTER. A member's failure to file or join in such a separate statement does not necessarily indicate his agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the Executive Secretary not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause.

(d) Amendment of Bylaws

The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

(e) Procedure

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.



Adjunct professor James O'Reilly making presentation at colloquy on the drug approval process in July.

APPENDIX H - THE ADMINISTRATIVE CONFERENCE ACT

TITLE 5, UNITED STATES CODE, CHAPTER 5

Subchapter III--Administrative Conference of the United States*

§571. Purpose

It is the purpose of this subchapter to provide suitable arrangements through which federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other federal responsibilities may be carried out expeditiously in the public interest.

§ 572. Definitions

For the purpose of this subchapter--

(1) "administrative program" includes a federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter, except that it does not include a military or foreign affairs function of the United States;

(2) "administrative agency" means an authority as defined by section 551(1) of this title; and

(3) "administrative procedure" means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action,

*Public Law 88-499, August 30, 1964, 78 Stat. 615; as codified by Public Law 89-554, September 6, 1966, 80 Stat. 388-390; as amended by Public Law 92-526, §1, October 21, 1972, 86 Stat. 1048; as amended by Public Law 95-293, §1 (a), June 13, 1978, 92 Stat. 317; as amended by Public Law 97-330, October 15, 1982, 96 Stat. 618; as amended by Public Law 97-258 §(a)(1), September 13, 1982, 96 Stat. 1062; as amended by Public Law 99-170, October 14, 1986, 100 Stat. 1198.

and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

§573. Administrative Conference of the United States

(a) The Administrative Conference of the United States consists of not more than 101 nor less than 75 members appointed as set forth in subsection (b) of this section.

(b) The Conference is composed of--

(1) a full-time Chairman appointed for a 5-year term by the President, by and with the advice and consent of the Senate. The Chairman is entitled to pay at the highest rate established by statute for the chairman of an independent regulatory board or commission, and may continue to serve until his successor is appointed and has qualified;

(2) the chairman of each independent regulatory board or commission or an individual designated by the board or commission;

(3) the head of each executive department or other administrative agency which is designated by the President, or an individual designated by the head of the department or agency;

(4) when authorized by the Council referred to in section 575(b) of this title, one or more appointees from a board, commission, department, or agency referred to in this subsection, designated by the head thereof with, in the case of a board or commission, the approval of the board or commission;

(5) individuals appointed by the President to membership on the Council who are not otherwise members of the Conference; and

(6) not more than 40 other members appointed by the Chairman, with the approval of the Council, for terms of 2 years, except that the number of members appointed by the Chairman may at no time be less than one-third nor more than two-fifths of the total number of members. The Chairman shall select the members in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to federal administrative procedure.

(c) Members of the Conference, except the Chairman, are not entitled to pay for service. Members appointed from outside the federal government are entitled to travel expenses, including per diem instead of subsistence, as authorized by section 5703 of this title for individuals serving without pay.

§574. Powers and Duties of the Conference

To carry out the purpose of this subchapter, the Administrative Conference of the United States may--

(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out admin-

istrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;

(2) arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure; and

(3) collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure.

§ 575. Organization of the Conference

(a) The membership of the Administrative Conference of the United States meeting in plenary session constitutes the Assembly of the Conference. The Assembly has ultimate authority over all activities of the Conference. Specifically, it has the power to--

(1) adopt such recommendations as it considers appropriate for improving administrative procedure. A member who disagrees with a recommendation adopted by the Assembly is entitled to enter a dissenting opinion and an alternate proposal in the record of the Conference proceedings, and the opinion and proposal so entered shall accompany the Conference recommendation in a publication or distribution thereof; and

(2) adopt bylaws and regulations not inconsistent with this subchapter for carrying out the functions of the Conference, including the creation of such committees as it considers necessary for the conduct of studies and the development of recommendations for consideration by the Assembly.

(b) The Conference includes a Council composed of the Chairman of the Conference, who is Chairman of the Council, and 10 other members appointed by the President, of whom not more than one-half shall be employees of federal regulatory agencies or executive departments. The President may designate a member of the Council as Vice Chairman. During the absence or incapacity of the Chairman, or when that office is vacant, the Vice Chairman shall serve as Chairman. The term of each member, except the Chairman, is 3 years. When the term of a member ends, he may continue to serve until a successor is appointed. However, the service of any member ends when a change in his employment status would make him ineligible for Council membership under the conditions of his original appointment. The Council has the power to--

(1) determine the time and place of plenary sessions of the Conference and the agenda for the sessions. The Council shall call at least one plenary session each year;

(2) propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Assembly;

(3) make recommendations to the Conference or its committees on a subject germane to the purpose of the Conference;

(4) receive and consider reports and recommendations of committees of the Conference and send them to members of the Conference with the views and recommendations of the Council;

(5) designate a member of the Council to preside at meetings of the Council in the absence or incapacity of the Chairman and Vice Chairman;

(6) designate such additional officers of the Conference as it considers desirable;

(7) approve or revise the budgetary proposals of the Chairman; and

(8) exercise such other powers as may be delegated to it by the Assembly.

(c) The Chairman is the chief executive of the Conference. In that capacity he has the power to-

(1) make inquiries into matters he considers important for Conference consideration, including matters proposed by individuals inside or outside the federal government;

(2) be the official spokesman for the Conference in relations with the several branches and agencies of the federal government and with interested organizations and individuals outside the government, including responsibility for encouraging federal agencies to carry out the recommendations of the Conference;

(3) request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law;

(4) recommend to the Council appropriate subjects for action by the Conference;

(5) appoint, with the approval of the Council, members of committees authorized by the bylaws and regulations of the Conference;

(6) prepare, for approval of the Council, estimates of the budgetary requirements of the Conference;

(7) appoint and fix the pay of employees, define their duties and responsibilities, and direct and supervise their activities;

(8) rent office space in the District of Columbia;

(9) provide necessary services for the Assembly, the Council, and the committees of the Conference;

(10) organize and direct studies ordered by the Assembly or the Council, to contract for the performance of such studies with any public or private persons, firm, association, corporation, or institution under title III of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. §§251-260), and to use from time to time, as appropriate, experts and consultants who may be employed in accordance with section 3109 of this title at rates not in excess of the maximum rate of pay for grade GS-15 as provided in section 5332 of this title;

(11) utilize, with their consent, the services and facilities of federal agencies and of state and private agencies and instrumentalities with or without reimbursement;

(12) accept, hold, administer, and utilize gifts, devises, and bequests of property, both real and personal, for the purpose of aiding and facilitating the work of the Conference. Gifts and bequests of money and proceeds from sales of other property received as gifts, devises, or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the Chairman. Property accepted pursuant to this section, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gifts, devises, or bequests. For purposes of federal income, estate, or gift taxes, property accepted under this section shall be considered as a gift, devise, or bequest to the United States;

(13) accept voluntary and uncompensated services, notwithstanding the provisions of section 1342 of Title 31;

(14) on request of the head of an agency, furnish assistance and advice on matters of administrative procedure; and

(15) exercise such additional authority as the Council or Assembly delegates to him.

The Chairman shall preside at meetings of the Council and at each plenary session of the Conference, to which he shall make a full report concerning the affairs of the Conference since the last preceding plenary session. The Chairman, on behalf of the Conference, shall transmit to the President and Congress an annual report and such interim reports as he considers desirable.

§576. Authorization of Appropriations

There are authorized to be appropriated to carry out the purposes of this subchapter not more than \$1,600,000 for fiscal year 1986 and not more than \$2,000,000 for each fiscal year thereafter up to and including fiscal year 1990. Of any amounts appropriated under this section, not more than \$1000 may be made available in each fiscal year for official reception and entertainment expenses for foreign dignitaries.

